Supreme Court, U.S.
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No. 07-~~654~~

In The
Supreme Court of the United States

KENNETH JONES,

Petitioner,

v.

ADAM JENNINGS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

Kenneth Jones
By His Attorneys,

PATRICK C. LYNCH
Attorney General

REBECCA TEDFORD PARTINGTON*
Assistant Attorney General
150 South Main Street
Providence, RI 02903
Tel. (401) 274-4400 ext. 2303
Fax (401) 222-2995

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Amendment is violated when, for several seconds, a law enforcement officer uses a compliance technique on a suspect who may be concealing a weapon, who seconds before injury was kicking wildly at the officers, who actively resisted and refused to stop resisting and give his hand for cuffing, when that suspect claims to be in pain, but is not yet under control.

2. Whether the First Circuit departed from bedrock qualified immunity principles in two respects: First, in holding that the law was "clearly established" by the Eleventh Circuit in a case involving injury to a resisting suspect who "docilely submitted to arrest" that did not involve a compliance technique; and second, through its determination that the officer's conduct was such an "obvious violation" of the Fourth Amendment that no testimony, evidence, or case law was needed, and that the jury could rely on its common sense and reject the only expert testimony affirming the use of the technique as reasonable under the circumstances.

3. In deciding a Motion for Judgment as a Matter of Law, when a judge is assessing the defense of qualified immunity following a general jury verdict in favor of the plaintiff, whether the judge must deem the jury to have found those facts that are *most* unfavorable to the qualified immunity defense, especially when those facts are contradicted by a videotape of the incident.

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OPINIONS BELOW

The opinion of the First Circuit Court of Appeals reported at *Jennings v. Jones*, 499 F.3d 2 (1st Cir. 2007) and reproduced in Appendix at pages 1-68, vacated the unreported memorandum and order of the District Court granting Petitioner's post-trial Motion for Judgment as a Matter of Law, available at 2005 WL 2043945 (D.R.I. Aug. 24, 2005) (Appendix 69).[1]

JURISDICTION

On August 24, 2005 the District Court granted Petitioner's post-trial Motion for Judgment as a Matter of Law (JMOL). On March 7, 2007, the First Circuit vacated the District Court judgment, reinstating the jury verdict. In response to a request by Petitioner for en banc consideration, on August 17, 2007, the First Circuit entered a revised panel decision and judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

[1] References to the Appendix are hereinafter designated "App." References to the Record Appendix filed with the First Circuit are designated "R".

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent, Adam Jennings, seeks damages pursuant to 42 U.S.C. §1983 for an alleged violation of his rights under the Fourth Amendment to the United States Constitution, which provides: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

STATEMENT OF THE CASE

This case arises from injuries received when a Rhode Island State Police officer, Trooper Kenneth Jones (Jones), used a pain compliance technique on a resistant suspect for several seconds while the suspect exclaimed the officer was causing him pain. Contrary to holdings in the Eleventh and Ninth Circuits, the First Circuit held that officers are constitutionally obligated to credit a suspect's claims of pain during an otherwise lawful arrest.

The First Circuit's opinion departed from precedent in several key respects, each deserving of this Court's review. First, a two-judge majority rejected established Fourth Amendment caselaw by viewing the evidence *not* in the light of a reasonable officer on the scene, instead holding that the jury could have applied its common sense and rejected the uncontradicted testimony of the only expert to testify. The First Circuit also now stands alone in refusing to

review the totality of the circumstances facing Jones, instead focusing on a snippet of "several seconds."

Next, the First Circuit departed from sister circuits in granting constitutional significance to complaints of pain from an arrestee. The Circuit ruled it was "obvious" that Jones should have known that such complaints should be heeded, and that failure to do so violated the Constitution. If unreviewed, the First Circuit's decision will have a chilling effect on attempts by police officers to arrest resisting suspects who – before they are under control – claim a lawful arrest is hurting them, presenting officers with the Hobson's choice of risking civil liability or becoming a victim themselves. The First Circuit opinion creates a new rule unsettling the law of qualified immunity, placing suspects, officers, and bystanders in significant danger.

Another departure from other circuits and from decisions of this Court was the finding that a single decision from another jurisdiction "clearly established" the law for qualified immunity purposes, in light of cases more similar to the situation facing Jones.

Finally, the opinion raises a procedural issue so significant that the dissent requested guidance from this Court: how does a judge in evaluating qualified immunity defer to a jury's discernible resolution of disputed factual issues on a motion pursuant to Fed. R. Civ. P. 50 following a general jury verdict?

Facts Developed at Trial

On July 14, 2003, the Rhode Island State Police executed a warrant to seize cigarettes being sold illegally in Charlestown, Rhode Island. Undercover detectives were the first to enter the shop. Moments later, uniformed troopers Jones, Hill and Buonaiuto, along with a number of others, approached from outside. From the outset, Jennings was hostile and combative, shouting, cursing and gesturing. He was inciting others and interfering with officers' ability to execute the search warrant.[2] (R514, R552, R593, R603, R604, R605, R606, R624, R625). At one point, Detective Shepherd was checking under the counter to insure that there was nothing he could use as a weapon, such as scissors. (R625). Jennings' disruptive behavior escalated and Detective Bell ordered him arrested for disorderly conduct. (R552).

At this point, Jones was on the deck landing adjacent to the door of the shop, and heard Bell say "cuff him" and then heard Jennings yell "I'm not gettin' arrested." Jennings then assumed a defensive stance, backing up to the wall and lowering his center of gravity, resisting the attempts of the troopers to control him. (R79-84). Jones entered the trailer, and Jennings kicked wildly at him. Jones grabbed Jennings' leg to control it. (R122). Jennings was then taken down to the ground, where he lay on his stomach, clasping his hands at his waistband, to

[2] He was seated behind the counter next to the cash register. (R608).

keep them from the officers. (R76-77, R123, R149). At this point, no one knew if Jennings was armed (R121-124), and officers repeatedly instructed Jennings to "stop resisting" and "give us your hands." (R105, R160, R163-164, R556, R598). Jennings continued to twist and turn while on the floor, clasping his hands underneath him, refusing to give them to any of the troopers. (R102, R106, R151, R160, R162, R597, R655). Hill managed to extricate only Jennings' left arm,[3] handed it to Detective Demers, and stood up. Hill testified that when he stood up Jennings was still resisting arrest, and it was his intention to get out of the way so that the other troopers could continue their attempts to get Jennings under control. (R151-152). Troopers testified that although the kicking had stopped at the time of injury, Jennings was still offering significant resistance by twisting and turning his body, and by refusing to give up his remaining hand for cuffing. (R102, R106, R151, R160-164, R597, R655). Although in a videotape of the struggle, Jennings can be heard yelling about his ankle, he never stopped fighting with the troopers and in fact continued to use his legs as weapons. He admits that he pulled his arms into himself, although the troopers repeatedly told him to show his hands. (R336). Most important is Jennings' own testimony *that his ankle was broken while he was on*

[3] The two-member majority only notes that one of Jennings' hands was obtained by the officers during the struggle. They fail to acknowledge that his other hand was under his body in his waistband at the time of the injury. (App.5).

his stomach, still on his right hand, before he was handcuffed and under control. (R338-339).

During the struggle (the entire incident lasted less than a minute, Jones' involvement was less than that – after Hill stood up was a p(iod of twelve to fifteen seconds), Jones employed a technique he was taught in the State Police Academy to control Jennings' leg and to ensure that he would comply and allow himself to be arrested. (R76-78). Jennings, however, continued to twist and turn. (R102, R106, R124, R160, R162, R597, R655).

Buonaiuto was directly across from Jones during the struggle. His testimony is important also because he is an instructor of defensive tactics at the State Police Academy. (R646). He testified that Jennings was "very aggressive" and was resisting arrest – as soon as Buonaiuto touched him, Jennings stiffened "like a telephone pole." (R651). Jennings then pulled in his hands and backed against the wall, gaining leverage. (R651). Although he had the best view of Jones' application of the hold, Buonaiuto did not tell Jones to stop, because he saw nothing unreasonable about Jones' actions. (R656).[4]

During this brief struggle, the overall situation was far from under control. The scene outside was

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[4] Jennings' section 1983 claim against Buonaiuto for failure to stop Jones from using excessive force was dismissed via a Rule 50 motion at the close of plaintiffs' case, and was not appealed. This is inconsistent with the First Circuit's ultimate finding of unreasonableness.

violent and tumultuous. The video of the chaos inside shows Jennings' mother striking Jones on his head while Jones was kneeling and holding Jennings' ankle. (App.72-3; R127). Jennings' arrest occurred on the border of these two chaotic scenes – in the open doorway to the shop itself.

Lt. Darren Delaney, the use of force/defensive tactics instructor at the State Police Academy, offered the only expert testimony. He testified for the defendants, but was offered as an expert witness by Jennings' attorney. (App.21; R463). Lt. Delaney teaches fifteen compliance techniques at the Academy. Their purpose is to make an individual comply and stop resisting so that an arrest can be accomplished. (R436).

Lt. Delaney offered a documentary representation of the "Use of Force Continuum" (R18) defining, categorizing and depicting the levels of resistance offered by individuals, side-by-side with the reasonable responses allowable on the part of troopers. (R18).[5] the levels of resistance depicted are: Level I – Compliant; Level II – Resistant (Passive); Level III – Resistant (Active); Level IV – Assaultive (Bodily Harm); and Level V – Assaultive (Serious Bodily Harm, Death). The reasonable response available to

[5] The Use of Force Continuum is a widely recognized concept used by law enforcement officers throughout the country. *Brister v. Walthall County Sheriff Deputies*, No. 2:05 cv 2045KS-MTP, 2007 WL 2254446, at *10 (S.D. Miss. Aug. 1, 2007).

troopers at each level are as follows: Level I – Cooperative Controls; Level II – Contact Controls; Level III – Compliance Techniques; Level IV – Defensive Tactics; and Level V – Deadly Force. Lt. Delaney testified that the technique used by Jones is available to troopers for application on individuals exhibiting resistance at Levels II – IV. (R458). Lt. Delaney teaches recruits that when making an arrest, they should stay within the level of force being offered by the person arrested. (R451).

After viewing the videotape of the incident, Lt. Delaney's expert opinion was that Jones used force that was reasonable under the circumstances. (R472). Lt. Delaney explained that Jennings' statement "I'm not gettin' arrested" initially fell into Level II – Passively Resistant. (R442). A trooper would be allowed to use compliance techniques at this point, including the ankle hold. (R468). When Jennings pulled his hands into his body and assumed a defensive stance he became actively resistant – Level III. (R443). Jennings reached Level IV – Assaultive Behavior, by kicking at Jones. (R447). According to Lt. Delaney, the levels of resistance offered by Jennings escalated "very quickly" from non-compliant to actively resistant and then assaultive. (R445). Lt. Delaney makes it clear that the use of force is gauged using these five levels. The movement upward and downward is as to those specific levels on the continuum and the particular methods of restraint, and not as to the particular degree of force used during application of the restraint or device. (R451, R457-458).

The uncontradicted testimony is that Jennings was assaultive before he was taken to the ground, and *continued his active resistance until he was flex cuffed,* after the injury. Detective Demers testified that Jennings was not under control until the flex cuffs were on both of his hands. (R599). Lt. Delaney testified that it would be proper to reduce force only if the suspect is in control and in custody (R468), and that it would have been a mistake for Jones to release Jennings' leg prior to cuffing because of the possibility that Jennings might kick again, and to assist the other officers in attempting to place flex cuffs on him. (R466, R472-473).

The Decision of the District Court

Three plaintiffs filed a complaint containing more than two dozen separate counts against eight defendants. The case was sent to the jury only on the claims by three plaintiffs against three troopers for excessive force, as well as state law battery claims. Jennings obtained a general verdict for $301,100.[6] (App.104-105). A post-trial motion for JMOL was granted by the District Court. (App.69-99).

The District Court admitted that it erred in declining to grant JMOL at the close of Jennings' case, since the jury did not have any evidence that Jones acted unreasonably. (App.79-80). The trial

[6] Jennings' medical costs totaled $1,100. The other plaintiffs did not prevail.

Court's application of Rule 50 rested on three independent grounds: First, that "Jennings failed to present *any* evidence that Jones' actions deviated from the standard of conduct that should have been expected from an objectively reasonable police officer under the circumstances"; second, "even if Jones' use of the 'ankle turn control technique' is viewed as amounting to excessive force it did not violate any 'clearly established' constitutional prohibition"; and third, that the "undisputed evidence demonstrates that it was 'objectively reasonable' for Jones to believe that he was acting lawfully." (App.80, 85-86).

The District Court noted "the relevant inquiry in excessive force cases is whether no reasonable officer could have made the same choice under the circumstances." (App.81). The trial judge cited Lt. Delaney's testimony as supporting the use of the technique in situations where a suspect is offering either active or passive resistance (App.85-86), holding that "[e]ven if Jennings had stopped actively resisting when his ankle was broken, the reasonableness of Jones' continued application of the ankle turn control technique must be judged in light of Jennings' earlier conduct and the facts available to Jones at the time that he acted." (App.84).

The District Court accepted Lt. Delaney's testimony that under the circumstances, Jones acted reasonably in using the ankle hold, because the resistance offered authorized its use, and that Jones acted reasonably in maintaining the hold because releasing it would have left all troopers vulnerable to

injury. The District Court noted that Jones had no way of knowing whether Jennings' statement that surgery had recently been performed on his ankle was true or merely a ruse to get Jones to release his hold. (App.84).[7]

> In short, there was an absence of any evidence that "no objectively reasonable officer" would have used the level of force used by Jones and, therefore, the jury unfairly was put in the untenable position of trying to decide that question without sufficient evidence of the applicable standard for measuring the lawfulness of Jones' conduct.

(App.86).

This alone supported JMOL. The trial court further noted that Jennings was "unable to cite any case . . . that holds the use of the ankle turn control technique, or any similar technique, in arresting an uncooperative subject to be unconstitutional." The trial court noted that the cases on point approved of and upheld the use of such techniques during an arrest. (App.89-91). The court determined the alleged constitutional violation would not be apparent to an objectively reasonable officer since Jones did not know why Jennings was being arrested or whether he was armed, Jones did not know why Jennings failed to heed orders to show his hands, and Jones had no

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[7] In fact, Jennings admitted that the statement to the officers – clearly audible on the video – that he had pins in his ankle *was completely false*. (R323).

way of knowing whether Jennings would resume kicking or resisting if he released the hold. (App.92-93).

> The ambiguity of the factual situation confronting Jones; the 'split second' nature of the decision that he was required to make; the existence of an established departmental policy permitting the use of the ankle control technique under such circumstances; and the absence of any case law prohibiting its use, virtually compel the conclusion that it was objectively reasonable for Jones to believe that he acted lawfully.

(App.93).

The Decision of the First Circuit

The First Circuit vacated the JMOL, reinstated the jury verdict and ordered that any further proceedings be consistent with its determination that excessive force was used and that qualified immunity did not apply. (App.43, 101). Despite a general verdict with no specific finding as to what the jury believed was excessive, a divided Court of Appeals found that the jury using its "common sense" could have found that the force used by Jones was excessive and that the law was "clearly established" on this point by a single Eleventh Circuit case denying summary judgment, or alternatively, that the violation was so obvious that no case law was needed.

The majority found that the force used was excessive despite acknowledging "Jennings initially

resisted the arrest, requiring the use of force by state police officials to subdue him" (App.1); that "Jennings resisted handcuffing . . . " (App.4); and that "officers repeatedly instructed Jennings to stop resisting and to show them both of his hands because they were concerned that he might have a weapon." (App.5). The two-member majority "recognize[d] the difficult situation confronting the police. It is undisputed that Jennings was challenging authority and resisting arrest. For much of the struggle, the police could not see Jennings' hands, and they reasonably could have believed that he might have a weapon." (App.20).

The majority recognized "[n]o expert testified that, under the circumstances faced by [Jones], no reasonable officer would have" acted as Jones did. (App.27). Under applicable precedent, this should have resulted in the affirmance of the District Court and the end of the case, yet the majority crafted a rule that no expert testimony was needed to come to the conclusion that excessive force was used, since this case involved force "applied with bare hands." (App.30).

The basis for the panel's decision finding excessive force and denying qualified immunity "was not merely Jones' use of force, but rather Jones' *increased* use of physical force after Jennings had ceased resisting for several seconds and stated that the force Jones was using was hurting his previously injured ankle." (App.21). The ultimate holding of the panel that Jennings was non-resistant is contradicted by a videotape of the incident, which demonstrates that

until the time of the injury officers continually instructed Jennings to stop resisting.

Reversing the trial judge's grant of qualified immunity, the majority held that *Smith v. Mattox,* 127 F.3d 1416 (11th Cir. 1997) gave Jones "fair warning" that his conduct was unconstitutional. (App.32). *Smith* was a case affirming denial of summary judgment, involving an arrestee who had "docilely submitted to arrest." *Smith* simply did not provide Jones with fair warning. Indeed, half of the judges who have considered this case do not believe that it does. The majority further determined that no decisional law was needed, since "the unlawfulness of [Jones'] conduct was readily apparent even without clarifying caselaw." (App.33-34).

In a spirited dissent Judge Lynch pointed out that the jury could not have found that Jones was either "plainly incompetent" or that he "knowingly violated the law" because the trial court determined that punitive damages were not warranted. (App.49). The dissent recognized that no First Circuit case gave Jones fair warning, nor was there a clear consensus of persuasive authority giving such notice. (App.56). She read *Smith v. Mattox* as supporting Jones, not Jennings. (App.58). She cited cases finding no excessive force where injuries resulted after officers were informed of pain or preexisting injuries during arrest. (App.58-59). She also pointed out that the majority confused who has the burden of proving clear notice for qualified immunity purposes, noting that the majority cited no cases supporting its distinction

between use of force and increased use of force. (App.58).

The dissent requested instruction from this Court as to the role of the trial judge in ascertaining facts when ruling on a Rule 50 motion after a general jury verdict, especially when the incident that is the focus of the jury's verdict is captured on videotape:

> This is an important issue. It is true that where the question is whether there is sufficient evidence to support a jury verdict (the usual question on a motion for JMOL), the appellate court will take all facts in favor of the verdict. But there is no attack on the sufficiency of the jury verdict, as to at least the second and third prongs of the immunity analysis. The attack is on the trial judge's separate conclusion, a determination assigned to the judge and not the jury, that Jones is entitled to immunity. This raises the question of how the judge, in evaluating immunity, is required to treat a general jury verdict, and that is precisely the type of black hole in the law we discussed [previously].
>
> * * *
>
> *These are important issues on which it would be helpful to have guidance from the Supreme Court.*

(App.53-54) (emphasis added).

In summary, Jennings presented no evidence that Jones' actions were unreasonable. To the contrary, two officers (one qualified as an expert by

Jennings' attorney) testified that Jones' actions were reasonable. Not only did Jennings fail to offer a single decision that would have given Jones "fair warning" that his conduct fell below constitutional requirements, several similar decisions have upheld the use of compliance techniques as reasonable. The First Circuit has crafted an unworkable constitutional requirement – contrary to other circuits – that when a suspect merely complains of pain, an officer must believe him and presumably stop the arrest instead of reacting to the totality of the circumstances. The First Circuit found this proposition so obvious that the jury was entitled to use its common sense and find against Jones. Finally, the First Circuit disagreed with other courts that have established a bright line in force cases – that point in the arrest when the suspect is under control, usually evidenced by handcuffing.

While the First Circuit has remanded the case for a ruling on Jones' pending motions it also stated that its determinations that Jones' use of the technique was excessive, unreasonable and violated clearly established law, "will control the future course of the proceedings." (App.42-43). The decision leaves Jones and all other law enforcement officers without clear guidance as to when or how they may use compliance techniques on resisting suspects.

REASONS FOR GRANTING THE WRIT

A writ of certiorari is necessary because the First Circuit creates a split among circuits (and departs from decisions of this Court) in holding that a single decision from another circuit can "clearly establish" the law for qualified immunity purposes. The decision also conflicts with other circuits that have considered the constitutional significance of an arrestee's complaints of pain *before* he is handcuffed and under control. This case has far-reaching public policy implications, in that it allows juries, untrained in the methods of arrest, to employ their common sense in determining whether excessive force has been used. This will result in considerable uncertainty for police officers, the public they serve, and culminate in wildly conflicting verdicts. Finally, certiorari is warranted to clarify what facts a court should consider when ruling on a Rule 50 post-trial motion based on qualified immunity.

I. THE FIRST CIRCUIT HAS SYSTEMATICALLY ABANDONED ESTABLISHED TESTS AND PRINCIPLES USED TO EVALUATE POLICE CONDUCT IN EXCESSIVE FORCE CASES.

In order to determine whether force used was reasonable under the Fourth Amendment, courts must pay "careful attention to the facts and circumstances of each particular case," including: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers

or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Saucier v. Katz*, 533 U.S. 194, 205 (2001). In *Saucier*, the Court reiterated the importance of the officer's "on scene perspective" and also emphasized that the officer's split-second judgment must be evaluated from the officer's "temporal perspective" of "reasonableness at the moment." *Saucier*, 533 U.S. at 206.

If the *Graham* factors are applied here, Jones wins; he did not know why Jennings was being arrested, but he knew that Jennings' behavior could result in serious injury to himself or his fellow officers, and that until the moment both of Jennings' hands were in the flex cuffs, he was actively resisting arrest and not under control.

A. Contrary To This Court's Instruction, The First Circuit Has Discarded The Totality Of The Circumstances Test.

There is universal agreement that courts must look at the totality of the circumstances to determine whether the amount of force used was reasonable. *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985); *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987); *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076 (8th Cir. 1990); *Garrett v. Athens-Clarke County*, 378 F.3d 1274 (11th Cir. 2004). The First Circuit's decision conflicts with this Court's command to evaluate reasonableness from the "on scene perspective" of the

officer who must make a split-second decision based on the limited facts and circumstances of the tense, uncertain, dangerous, and rapidly evolving scenario with which he is confronted. *Graham*, 490 U.S. at 396-97; *Saucier*, 533 U.S. at 205. All of the attendant circumstances must be taken into account. *Kesinger v. Herrington,* 381 F.3d 1243, 1248 (11th Cir. 2004) (citing *Graham*); *Vinyard v. Wilson*, 311 F.3d 1340, 1347 (11th Cir. 2002); *Curley v. Klem*, 499 F.3d 199 (3rd Cir. 2007).

The First Circuit departed from this venerable principle by abandoning the requirement that any incident involving use of force be viewed as a whole. Instead, the majority split Jennings' arrest into (1) the period before Hill stood up, and (2) the seconds that followed. The majority recognized that the critical period here was only "several seconds," which they defined as "more than two but fewer than many in number or kind." (App.6). The decision has its foundation in that brief period, rather than the entire chaotic incident.

In *Scott v. Harris*, 550 U.S. ___, 127 S.Ct. 1769 (2007), this Court recognized that split-second decisions regarding a response to a situation, especially one created by a suspect, must be given deference. *Id.* Other circuits recognize that courts should never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. In *Carswell v. Borough of Homestead*, 381 F.3d 235 (3rd Cir. 2004) the Third

Circuit granted qualified immunity in a case involving deadly force:

> Our recitation of these events is a discussion in slow motion of an incident that took place in a matter of seconds. Officer Snyder had no time for the calm, thoughtful deliberation typical of an academic setting.

Id. at 243. That court continued, stating "[w]hat constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." *Id.* at 244.

Indeed, a prior decision of the First Circuit in a case involving the Rhode Island State Police held that thirty seconds is too short a period of time to expect an officer to process the barrage of information incident to an arrest:

> It simply expects too much of an officer faced with an arrestee who has been evasive, one who already apparently has attempted to conceal a deadly weapon from him, one who displays on his shirtless torso tattoos indicative of his apparent propensity for violence, and one who appears to be resisting arrest, to think not only about all of this but about the weather, too. Certainly a reasonable officer might fail to contemplate all of this in the mere 30 seconds (or less) it took to cuff the appellant.

Milette v. Manni, No. 99-1498 (1st Cir. Dec. 14, 1999) (App.107).

B. The First Circuit Departed From Other Circuits That Have Established The Moment Of Handcuffing As A Bright Line For Determining When Force (Whether Used Or Increased) Is Excessive.

A police officer making an arrest is entitled to secure the suspect by means that include handcuffing. *McDermott v. Town of Windham*, 204 F.Supp.2d 54, 65 (D.Me. 2002). The holding in the case sub judice creates confusion in the law enforcement community because it does away with the general rule that only when the suspect is under control, evidenced by handcuffing, should the reasonable officer's response change. See, *Brister v. Walthall County Sheriff Deputies*, 2007 WL at * 10 ("An officer is required not to relax care until the suspect is fully secured."); *Tatum v. City and County of San Francisco*, 441 F.3d 1090 (9th Cir. 2006) (distinguishing between force applied before handcuffing with that applied post-handcuffing); *Mecham v. Frazier*, 500 F.3d 1200 (10th Cir. 2007) (finding use of pepper spray after traffic stop objectively reasonable because motorist refused orders to exit her vehicle, creating a flight risk if not subdued); *Garrett v. Athens-Clarke County,* 378 F.3d at 1281 (where the Eleventh Circuit held a few moments of compliance did not mandate a de-escalation of force); *Mann v. Yarnell*, 497 F.3d 822 (8th Cir. 2007) (no excessive force where injured suspect was not handcuffed, was still resisting "at least to some degree," had not been complying with the instructions repeatedly shouted at him, and was not "under complete police control").

This Court has recognized that clear guidelines are necessary in excessive force cases:

> Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.

Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001).

Other circuits have agreed that handcuffing is the signal that a suspect is no longer a threat. The First Circuit departs from that pragmatic recognition, and confuses the law enforcement community by referring to Jennings' conduct as "non-resistant" when that term was not used by witnesses, contradicts the only testimony offered (including a videotape), is not depicted on the Use of Force Continuum, and means nothing to police professionals. This decision now also requires, among officers' myriad other duties, a second-by-second evaluation of the level of force required, regardless of whether the suspect has been brought under control.

C. A Jury's "Common Sense" Cannot Be Used To Determine The Reasonableness Of An Officer's Conduct.

The First Circuit discards the undisputed evidence, applicable caselaw, and procedure. This is not

a case where expert testimony was offered over the suspect's objection. Jennings offered Lt. Delaney as an expert, effectively stipulating that the subject matter was outside the ken of ordinary jurors and that Lt. Delaney had the requisite specialized knowledge. This acknowledgment *by Jennings* is at odds with the majority's finding that no expert testimony was necessary and the jury was free to use their "common sense." The parties and the trial court agreed that expert opinion was required, and the First Circuit was not free to reject that determination.

Jones acted as he had been taught, as a reasonable officer in a similar situation would have acted. Lt. Delaney and Buonaiuto, both use of force instructors, testified that Jones' use of the technique was appropriate given the level of resistance offered, and both testified that he employed it correctly. In *Conn v. Gabbert*, 526 U.S. 286 (1999), this Court reviewed and reversed a Ninth Circuit decision in part because the circuit's decision was founded on notions of "common sense" and arguments that had "scant metaphysical support" rather than empirical evidence and established caselaw. Encouraging the use of the jury's common sense discards years of excessive force decisions and creates a rule of law different than in any other circuit.

D. There Is A Distinct Circuit Split As To The Constitutionally Mandated Response To A Subject Who Complains Of Pain, But Who Is Not Yet Under Control.

Contrary to sister circuits, and trial courts within the First Circuit, the two-member majority instructs officers that they must alter their arrest techniques when an arrestee who is not yet under control says "ow." The decision rests on "the common sense proposition that it is not reasonable for police officers to increase their use of physical force after an arrestee who has been resisting arrest stops resisting for several seconds and warns the officers that they are hurting his previously injured ankle." (App.29). Contrast *Rodriguez v. Farrell,* 294 F.3d 1276, 1278 (11th Cir. 2002), where the Eleventh Circuit stated that "a police officer need not credit everything a suspect tells him . . . especially . . . when the officer is in the process of handcuffing a suspect." *Rodriguez* relied on a New Hampshire case recognizing that "statements by suspects claiming (at the time of their arrest) to have pre-existing injuries are, 'no doubt, uttered by many suspects who, if given the choice, would prefer not to be handcuffed at all. . . . '" *Id.,* citing *Caron v. Hester*, No. Civ. 00-394M, 2001 WL 1568761, at *8 (D.N.H. Nov. 13, 2001). *See also McDermott v. Town of Windham,* 204 F.Supp.2d at 65 (The fact that the officer continued handcuffing despite the suspect's complaints of pain did not rise "anywhere near" the level of actionable force.) *Rodriguez* noted *Jackson v. City of Bremerton,* 268 F.3d 646

(9th Cir. 2001) and *Morreale v. City of Cripple Creek*, No. 96-1220, 1997 WL 290976 (10th Cir. May 27, 1997), both cases where arrestees were injured after informing officers of pre-existing injuries during an arrest. In these latter cases, no excessive force was found. If anything, they "clearly established" that an officer does not have to believe everything a suspect tells him. *See also Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994), cert. denied, 513 U.S. 1152 (1995) (upheld as reasonable "physical pressure administered on . . . limbs in increasing degrees, resulting in pain"); *Nolin v. Isbell*, 207 F.3d 1253, 1257-58 (11th Cir. 2000) ("painful handcuffing in the course of an arrest, without more, does not amount to excessive force if the resulting injuries are minimal"). In *Schultz v. Hall*, 365 F.Supp.2d 1218 (N.D. Fla. 2005), the arrestee had a disability and repeatedly told officers that she needed to be handcuffed in front. When they did not, she complained of pain. Summary Judgment was granted for the officers, even in light of significant injury. "[P]laintiff appears to have had a pre-existing condition which 'made what otherwise would be a common non-excessive handcuffing technique (that ordinarily would be painful but cause minimal injury) a maneuver that caused severe injury . . . .'" 365 F.Supp. at 1229 (citing *Rodriguez*). The facts of *Schultz* are strikingly similar to this case, but the outcome is completely different. This tension must be resolved so that law enforcement officers have consistent and fair notice as to what force is lawful.

II. THE FIRST CIRCUIT'S DECISION REJECTS LONGSTANDING QUALIFIED IMMUNITY PRECEDENT.

A. Smith v. Mattox Did Not Clearly Establish The Law In Rhode Island. Instead, Applicable Precedent Supports The Objective Reasonableness Of The Force Used In This Case.

The First Circuit determined that a single Eleventh Circuit decision on an interlocutory appeal gave Jones "fair and clear warning" that "it was unconstitutional for police officers to increase their use of physical force after an arrestee who has been resisting arrest stops resisting for several seconds and warns them that they are hurting his previously injured ankle." (App.31).[8] This Court has stated that one opinion recognizing a right will not fulfill the burden of "clearly establishing" the law. *Wilson v. Layne,* 526 U.S. 603 (1999).

An asserted right is not clearly established unless a plaintiff can cite "cases of controlling authority *in their jurisdiction* at the time of the incident which clearly established the rule on which they

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[8] Contrary to this holding, trial courts within the First Circuit had previously determined that a suspect did not have a clearly established right not to be handcuffed behind his back after he informed an officer of prior injury. *Caron v. Hester*, No. 00-394M, 2001 WL 1568761 (D.N.H. Nov. 13, 2001). This was confirmed in 2006 by *Calvi v. City of Rockland*, No. 05-11-P-S, 2006 WL 890687 (D. Me. 2006); aff'd sub nom. *Calvi v. Knox County*, 470 F.3d 422 (1st Cir. 2006).

[sought] to rely," *Wilson v. Layne,* 526 U.S. at 618 (emphasis added); *Luna v. Pico,* 356 F.3d 481, 490 (2nd Cir. 2004); *Warlick v. Cross,* 969 F.2d 303 (7th Cir. 1992).

To qualify as a clearly established right, "the law must have defined the right in a quite specific manner, and . . . the announcement of the rule establishing the right must have been *unambiguous and widespread*, such that the unlawfulness of particular conduct will be apparent *ex ante* to reasonable public officials." *Brady v. Dill*, 187 F.3d 104, 116 (1st Cir. 1999) (emphasis added). The question is not what a lawyer would learn or intuit from researching case law. *McCullough v. Wyandanch Union Free School Dist.,* 187 F.3d 272, 278 (2nd Cir. 1999). The burden of proving that the rights allegedly violated were clearly established falls upon the plaintiff, not the defendant. *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987).

Before August 17, 2007 the First Circuit was consistent with other circuits when determining what law is "clearly established" for qualified immunity purposes:

> To attain the necessary perspective, an inquiring court must look back in time and conduct the judicial equivalent of an archaeological dig. The court must canvass controlling authority in its own jurisdiction and, if none exists, attempt to fathom whether there is a *consensus of persuasive* authority elsewhere.

Savard v. Rhode Island, 338 F.3d 23, 28 (1st Cir. 2003), cert. denied, 540 U.S. 1109 (emphasis added). Two federal court judges do not believe *Smith* provided "fair warning." "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. at 618.

Smith v. Mattox did not give Jones fair warning that his conduct violated the Fourth Amendment. The decision was not issued by the First Circuit and the facts were not analogous. The suspect in *Smith* "docilely submitted to arrest . . . " and later his arm was broken. 127 F.3d at 1418-20. No evidence suggests that Jennings was docile, before or after the command to arrest him was given. It is doubtful that even the Eleventh Circuit would apply *Smith v. Mattox* to this case, given its admonition that "if case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." 127 F.3d at 1419.

The Eleventh Circuit found that the handcuffing of the suspect in *Smith* presented a "close case" on summary judgment. It is unknown how that case was resolved, but *Smith* was a handcuffing case, not a compliance technique case. Because it was an interlocutory appeal that court had to assume the suspect was offering no resistance *at all* and had obeyed all orders of the officers to lie down and produce his hands for cuffing, unlike Jennings. 127 F.3d at 1420.

The First Circuit has previously recognized that thirty seconds was simply too short of a period to expect an arresting officer to process information and react. *Milette v. Manni, supra.* (App.106-7). If anything, *Milette* "clearly establishes" that a thirty-second time period is insufficient for an officer to be expected to alter his or her behavior when arresting a combative suspect, and highlights not only a circuit split, but internal inconsistency.

Despite having no burden, Jones referred the trial court to more analogous cases involving compliance techniques. *See Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001) (granting qualified immunity where the Tenth Circuit had not ruled on the validity of a particular restraint); *Leporace v. City of Philadelphia*, No. 96-6363, 1998 WL 309865 (E.D. Pa. June 9, 1998) (upholding twisting of plaintiff's arm and wrestling with him after he walked away from officers); *Crosby v. Munroe County*, 394 F.3d 1328 (11th Cir. 2004) (upholding blow to head where it was unclear whether suspect was armed); *Smith v. Ball State Univ.*, 295 F.3d 763 (7th Cir. 2002) (no excessive force found in use of holds on suspect mistakenly thought to be intoxicated). These decisions, coupled with *Milette,* "clearly establish" that Jones' actions were reasonable.

This Court should grant certiorari to clarify what constitutes fair warning in a qualified immunity analysis. If that doctrine is to retain any vitality, this decision cannot stand.

B. A Reasonable Officer Would Not Have Known That His Actions Were Unconstitutional.

Qualified immunity is a presumption that must be rebutted. *Mossey v. City of Galveston*, 94 F.Supp.2d 793 (S.D. Tex. 2000). A claimant has the burden to prove that no reasonable, similarly situated official could have considered the conduct of the official in question to be lawful, under the circumstances known to him at the time. Courts must be careful not to substitute their judgment for that of the reasonable officer on the scene. *Graham,* 490 U.S. at 396.

Even if Jones was mistaken about the need for the use of the technique, or any of the underlying facts, he reasonably could have believed that his utilization of the technique was lawful. The trial judge was *not* bound by Jennings' arguments. The undisputed facts show that Jones did not know "why Jennings was being arrested or whether he was armed. Nor could Jones have known, with any certainty, why Jennings failed to heed orders to show his hands. Moreover, even if Jennings had stopped actively resisting, Jones had no way of knowing whether Jennings would resume kicking or resisting if Jones released his ankle hold." (App.93).

As the trial court put it:

> The ambiguity of the factual situation confronting Jones; the 'split second' nature of the decision that he was required to make; the existence of an established departmental

> policy permitting use of the ankle control technique under such circumstances; and the absence of any case law prohibiting its use, virtually compel the conclusion that it was objectively reasonable for Jones to believe that he acted lawfully.

(App.93).

At worst, this is a case falling into the hazy border between excessive and acceptable force, an area where qualified immunity must apply. *Brousseau v. Haugen*, 543 U.S. 194 (2004).

C. The Use Of Force Was Not Obviously Excessive.

The majority found that Jones should have known that his conduct obviously violated Jennings' constitutional rights. (App.33). A flaw in this finding is that the trial court granted JMOL in two key aspects: punitive damages, and as to the civil rights actions against the troopers who failed to stop Jones from utilizing the compliance technique. These decisions, not appealed by Jennings, are inconsistent with the majority's determination that the unlawfulness of Jones' conduct was apparent.

The majority acknowledged that the situation – created *by Jennings* – made it difficult for Jones to gauge the appropriate level of force. (App.38). *Saucier's* protection for reasonable or mistaken beliefs

should therefore shield Jones from liability. 533 U.S. at 705.

The majority wrote that *Smith v. Mattox* "emphasizes the obvious unconstitutionality of increasing the force used on an arrestee to such a degree that a broken ankle results." (App.33). This, although it has been noted that the fact of injury is not determinative of whether a constitutional right has been violated. *Flanigan v. Town of Colchester*, 171 F.Supp.2d 361 (D.Vt. 2001); *Pena-Borrero v. Estremeda*, 365 F.3d 7 (1st Cir. 2004). In fact, the circuit that penned *Smith* found that even a case with horrific injuries did not rise to the level of a constitutional violation. In *Rodriguez v. Farrell*, *supra*, a pre-existing injury was exacerbated by cuffing a suspect behind his back, resulting in twenty-five surgeries and eventual amputation of an arm.

In sum, the undisputed evidence demonstrates that 1) Jennings was not totally secured at the time his ankle was broken; 2) Jennings had posed a threat to the safety of the officers and others just seconds before cuffing; 3) officers were having a difficult time getting the flex cuffs on Jennings; and 4) Jones' overall use of force was, in the opinion of the expert, reasonable under the circumstances. (App.65-66). Two judges and the only testimony offered at trial concluded that based on these facts Jones' conduct was not objectively unreasonable.

III. BECAUSE OF THE UNDEFINED NATURE OF THE STANDARD A COURT IS TO USE IN DECIDING A POST-JUDGMENT MOTION PURSUANT TO FED. R. CIV. P. 50 BASED ON QUALIFIED IMMUNITY, THIS COURT SHOULD GRANT CERTIORARI.

The issue of qualified immunity is one for the trial court's determination, not a question for the jury. *Hunter v. Bryant,* 502 U.S. 224 (1991). (App.46). As the dissent notes, this Court has never addressed the question of "what role jury findings play in the judicial immunity determination . . . " (App.46) saying "[t]hese are important issues on which it would be helpful to have guidance from the Supreme Court." (App.54). In fact, the First Circuit has twice before indicated a need for instruction in this area. *See Kelley v. LaForce*, 288 F.3d 1, 7 n.2 (1st Cir. 2002) ("[T]he Supreme Court has not clearly indicated whether the judge may act as fact-finder when there is a factual dispute underlying the qualified immunity defense or whether this function must be fulfilled by a jury."); *Ringuette v. City of Fall River*, 146 F.3d 1, 6 (1st Cir. 1998) ("Something of a 'black hole' exists in the law as to how to resolve factual disputes pertaining to qualified immunity when they cannot be resolved . . . prior to trial.").

The jury certainly did not find two facts: "First, Jones did not break Jennings' ankle with reckless or callous indifference to Jennings' federal rights. Second, he did not knowingly violate the law." (App.49). This is because punitive damages were deemed

unwarranted by the trial court. It is accurate to say that "[o]n this record, there is considerable ambiguity and no certainty about what underlying factual conclusions motivated the *general* verdict." (App.52-53). There were no "foundational, historical facts" that would explain the jury's rationale. *See, e.g., Acosta v. City and County of San Francisco,* 83 F.3d 1143, 1147 (9th Cir.), cert. denied, 519 U.S. 1009 (1996). We simply do not know precisely why the jury found against Jones, but neither did the two-person majority.[9]

In keeping with this Court's "totality of the circumstances" view in excessive force/qualified immunity cases, the District Court stated: "The jury determined that Jones' use of the ankle turn control technique amounted to excessive force." (App.82). That is all that the District Court could say without speculating, and the First Circuit went too far in hypothesizing that the jury must have based its decision on an increased force theory.

The two-judge majority concluded, absent any evidence, that the increased force employed by Jones caused the broken ankle. (App.17). Even the treating physician did not go that far: he stated only that "the cause of the fracture was the altercation and

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[9] Of course, jurors could have awarded Jennings damages simply because he was injured. (App.2). This, of course, would be directly contrary to instructions that the fact of injury is not determinative in an excessive force case. *Flanigan v. Town of Colchester, supra*; *Pena-Borrero v. Estremedia, supra.*

whatever stress was placed on his ankle." (R363). Thus, not only did the First Circuit reject expert testimony as to use of force, it also intruded into the arena of medical expertise.

In considering a Rule 50 motion a trial court is to draw all rational inferences from the facts in favor of the plaintiff – however, he is not entitled to inferences based on speculation and conjecture. *Borges Colon v. Roman-Abreu*, 438 F.3d 1 (1st Cir. 2006). In qualified immunity cases, a trial court is to defer to the jury's "discernible resolution of disputed factual issues." *Id.* at 18 (citations omitted); *Iacobucci v. Boulter*, 193 F.3d 14, 23 (1st Cir. 1999).

The only reasonably discernible facts in this case were that Jennings was assaultive and resistant, refusing to give up his hands and was not handcuffed at the time of injury. The videotape of the incident is crucial as it shows that several officers continued to order Jennings to stop resisting, even after Hill stood up. The "bright line" in this case is not when Hill stood up, because everyone testified that Jennings was not yet under control at that point. Jennings was not under control until the flex cuffs were put on both hands after the injury.

Despite recognizing that deference should be accorded only to the jury's *discernible* resolution of disputed factual issues, the majority relies on the supposition that the jury must have thought Jones increased torque on Jennings, and that that increase crossed a constitutional line. (App.10). This is pure

speculation. Since the verdict was a general one, "it is far from obvious on what subsidiary facts the verdict rested." (App.52). This issue is so important that the dissent writes " . . . it would be helpful to have guidance from the Supreme Court." (App.54). This issue alone merits review by this Court.

In *Scott v. Harris*, *supra*, a videotape contradicted plaintiff's version of the facts submitted for summary judgment. This Court held that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." 550 U.S. at ___, 127 S.Ct. at 1776.

The videotape of this arrest shows the extent of Jennings' combative nature mere seconds before injury. It also clearly shows officers telling him to stop resisting and he wouldn't get hurt – up to the instant of injury. These facts contradict the findings of the First Circuit, especially its insistence that Jennings was not resisting at the time of injury. Further, the videotape contradicts any assertion that Jennings docilely submitted to arrest as in *Smith v. Mattox*, cited by the majority as providing "fair warning" to Jones that his actions were unconstitutional. (App.83).

The record in this case presents a clear set of facts for this Court to grant certiorari and decide these pressing issues of national importance.

CONCLUSION

Among the risks police officers face daily, none is more dangerous than those times when they are forced to engage a combative suspect. That danger remains until the suspect is under control and handcuffed. Those critical moments between first contact and ultimate control – here, mere seconds – are perilously unstable, unpredictable and potentially deadly. This Court should grant certiorari to return discretion to law enforcement officers as they make the split second decisions that occur so often in their environment, and return the law of qualified immunity to its more workable state, as it existed prior to this decision.

Respectfully submitted,

KENNETH JONES
By his attorney,

PATRICK C. LYNCH
Attorney General

REBECCA TEDFORD PARTINGTON #42236
Assistant Attorney General
150 South Main Street
Providence, RI 02903
Tel. (401) 274-4400 x 2303
Fax (401) 222-2995

2007 WL 2339195

United States Court of Appeals, First Circuit.

Adam JENNINGS, Plaintiff, Appellant,

v.

Kenneth JONES, Defendant, Appellee.

No. 05-2522.

Heard Sept. 11, 2006.
Decided Aug. 17, 2007.

Michael Bradley for appellant.

Rebecca Tedford Partington, Deputy Chief, Civil Division, Rhode Island Attorney General's Office, for appellee.

Before TORRUELLA, LYNCH and LIPEZ, Circuit Judges.

LIPEZ, Circuit Judge.

Appellant Adam Jennings, a member of the Narragansett Indian Tribe, worked at a "smoke shop" operated by the tribe and located on Indian tribal land in Charlestown, Rhode Island. The smoke shop sold an array of cigarettes to members of the tribe and the general public. During a search of the smoke shop by the Rhode Island State Police, Jennings was arrested for disorderly conduct. Jennings initially resisted the arrest, requiring the use of force by state police officials to subdue him. As a result of that confrontation, appellee Kenneth Jones used an "ankle turn control technique" which broke Jennings' ankle. Jennings brought suit under 42 U.S.C. § 1983 against

Jones and other officers, claiming that they had violated his Fourth Amendment rights by using excessive force to restrain him. Jennings also brought a claim under state law for battery.

Although a jury found in favor of most of the defendants, it ruled for Jennings on his excessive force and battery claims against Jones and awarded compensatory damages of $301,100. The district court then granted Jones' post-verdict motion for judgment as a matter of law, ruling for Jones on all three prongs of the qualified immunity inquiry. It first held that there was no constitutional violation because there was no evidence from which a reasonable jury could have concluded that the force used to subdue Jennings was excessive. It then concluded that, even if there had been a constitutional violation, Jones was entitled to qualified immunity because the relevant law was not clearly established and a reasonable officer would not have believed that the force was excessive and thus in violation of the Fourth Amendment. The court also granted judgment as a matter of law for Jones on the battery claim. Along with his motion for judgment as a matter of law, Jones filed motions for a new trial and a remittitur. In contravention of Federal Rule of Civil Procedure 50, the district court did not rule on these motions.

On appeal, Jennings challenges the court's determinations on his Fourth Amendment claim. After careful review, we conclude that the court erred in granting qualified immunity to Jones. First, viewing the evidence in the light most favorable to the jury

verdict, we conclude that the record establishes that Jones violated Jennings' constitutional right to be free of excessive force. Second, we find that this right was clearly established at the time of Jennings' injury. Third, we conclude that a reasonable officer in Jones' position would have believed that his actions violated Jennings' constitutional right. Consequently, we vacate the judgment of the district court and order reinstatement of the jury award. However, because the district court failed to rule on Jones' motions for a new trial and a remittitur in accordance with Federal Rule of Civil Procedure 50, we remand to that court for a ruling on those motions.

I.

A. Factual Background

In reviewing a grant of judgment as a matter of law following a jury verdict, "[w]e examine the record as a whole, reading the evidence in the light most favorable to the jury verdict." *Cruz-Vargas v. R.J. Reynolds Tobacco Co.*, 348 F.3d 271, 275 (1st Cir.2003).

On July 14, 2003, Jennings was at work in a trailer referred to as the "smoke shop" owned and operated by the Narragansett tribe and located on tribal land in Charlestown, Rhode Island. The tribe and the State of Rhode Island were engaged in an ongoing dispute about whether the tribe could sell

cigarettes tax-free.[1] Pursuant to this dispute, the Rhode Island State Police had obtained a warrant to seize the cigarettes at the smoke shop, and several plain clothes officers were stationed inside the shop. After uniformed officers arrived in marked cars in the parking lot, the undercover officers inside the shop instructed Jennings to take a seat behind the sales counter. Jennings initially grabbed onto the counter, but then complied and seated himself behind the counter. He also complied when the state police asked him to move to a different seat.

Jennings testified that he was "upset" during these events. He complained loudly that the Rhode Island police had no right to be on his property, and he expressed concern over their treatment of his mother, who was also in the shop. He repeatedly used profanity in his comments.

Eventually, Officer Ken Bell asked Jennings to leave the shop without informing him that he was under arrest for disorderly conduct. A video taken by the state police shows that as Jennings was leaving the shop, an officer issued an order to handcuff him, and Jennings responded, "I'm not getting arrested." The video also shows that Jennings resisted handcuffing and that several officers subsequently

[1] This court addressed other issues arising out of this dispute in *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir.2006) (en banc), which provides further background on the events that precipitated the search of the smoke shop.

wrestled him to the floor. Jones was one of the officers involved in subduing Jennings. He used an ankle restraint technique called the "ankle turn control technique" to control Jennings' leg.

During this conflict, the officers repeatedly instructed Jennings to stop resisting and to show them both of his hands because they were concerned that he might have a weapon. Jennings was initially unable to produce his left hand for handcuffing because it was trapped underneath his body. Officer Hill, one of the officers who was attempting to subdue Jennings, testified that he pulled Jennings' left arm out from under his body. The video shows that Hill then got up and walked away.

Jennings testified that he had ceased resisting before his arm was pulled out from underneath his body. About sixteen months prior to the smoke shop confrontation, Jennings had broken the ankle that Jones was restraining and had surgery performed on it. The officer's use of the "ankle turn control technique" caused Jennings considerable pain. Jennings informed Jones that the force Jones was using was hurting his previously injured ankle. Jones then increased the amount of force he was using and broke Jennings' ankle.

On the video, several seconds elapse from the time that Hill got up and left to the time that

Jennings yelled in pain as his ankle was broken.[2] Within seconds after Jennings' injury, the officers brought Jennings to his feet, already handcuffed, and escorted him outside the smoke shop.

B. Procedural History

Jennings brought this action against Jones and several other police officers seeking damages under 42 U.S.C. § 1983 for excessive use of force and for battery under state law.[3] The officers moved for

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[2] There is some uncertainty as to the precise length of time that elapsed between the time that Hill got up and the time that Jennings yelled in pain. In his closing argument to the jury, Jennings' attorney described the interval as "twelve seconds at least," while Jennings' appellate brief describes the interval as eighteen seconds, citing only to the videotape of the incident. Although the videotape was played for the jury several times at trial and the jury also viewed the videotape during its deliberations, no one actually testified to the length of time that elapsed. Jones' appellate brief describes the time as "12-15 seconds" without citation. Consequently, we will describe the length of time as "several seconds." Dictionaries typically define "several" as "being more than two but fewer than many in number or kind." *See Random House Dictionary of the English Language* 1754 (2d ed.1987). While this definition is necessarily inexact, we can do no better with this record.

[3] This case originally was brought by Jennings, his mother Paulla Dove Jennings, and Keith Huertas, another employee of the smoke shop. The plaintiffs alleged a wide array of claims against various defendants, including excessive force under the Fourth Amendment, violation of equal protection under the Fourteenth Amendment, negligent infliction of emotional distress, intentional infliction of emotional distress, false imprisonment, and assault and battery. Aside from Jennings'

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judgment as a matter of law after the close of Jennings' evidence, raising the qualified immunity defense for the first time.[4] The court denied the motion with respect to Jennings' excessive force claim against Jones,[5] noting:

> There was testimony as to Trooper Jones that he continued twisting the ankle of Mr. Jennings even after Mr. Jennings had been subdued and even after Mr. Jennings says that he told him that he'd had a previous injury to the ankle and he was breaking the ankle. So as to Detective Jones, there's enough evidence from which a jury at this point could conclude that the force was excessive.

The court did not explicitly address the issue of qualified immunity. After the close of all the evidence, defendants renewed their motion for judgment as a matter of law, but did not specifically renew their qualified immunity argument. The court again denied

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excessive force and battery claims against Jones, all the claims were resolved in defendants' favor, either by the court on defendants' motions for judgment as a matter of law or by the jury in its verdict. No other plaintiffs or defendants are involved in this appeal.

[4] The government explains that it did not file a pretrial motion raising the qualified immunity issue because Jones and other officers were not named in their individual capacities until shortly before the deadline for filing motions.

[5] At this juncture, the court granted judgment as a matter of law on various other claims that have no bearing on this appeal.

the motion with respect to Jennings' excessive force claim against Jones,[6] explaining:

> [W]e have very different versions as to what happened. According to Mr. Jennings, Trooper Jones grabbed his ankle, he wasn't kicking, he wasn't doing anything that would warrant it. Trooper Jones grabbed his ankle, twisted his ankle, he told him that he had had previous surgery on the ankle, and that the ankle, he was in the process of breaking his ankle. And according to Mr. Jennings, Trooper Jones actually increased the pressure on the ankle and broke his ankle. . . . If the jury accepts Mr. Jennings' version, it might very well find that Trooper Jones used excessive force.

Again, the court did not explicitly address the issue of qualified immunity.

The case was submitted to the jury, which awarded Jennings $301,100 in compensatory damages for his claims against Jones. Following the verdict, Jones moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b) on the ground that he was shielded from liability by the doctrine of qualified immunity. Jones also moved for a new trial, or, in the alternative, to amend the judgment by granting a remittitur.

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[6] At this juncture, the court again granted judgment as a matter of law on various other claims that have no bearing on this appeal.

The district court granted Jones' motion for judgment as a matter of law, concluding that it had erred in submitting the case to the jury to determine whether excessive force was used and ruling for Jones on all three prongs of the qualified immunity inquiry. It first held that there was no constitutional violation because there was no evidence from which a reasonable jury could have concluded that the force used to subdue Jennings was excessive. It then concluded that, even if there had been a constitutional violation, Jones was entitled to qualified immunity because the relevant law was not clearly established and a reasonable officer would not have believed that the force was excessive and thus in violation of the Fourth Amendment. In granting judgment as a matter of law, the court also held that the remaining motions for a new trial and for a remittitur had become moot.[7] This appeal ensued.[8]

II.

The issue before us is whether the district court properly found appellee Jones entitled to qualified immunity from damages. When a defense of qualified immunity is pressed after a jury verdict, we have determined that "the evidence must be construed in

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[7] As we shall explain, this ruling of mootness was incorrect. *See infra* Section IV.

[8] On appeal, Jennings does not contest the district court's grant of judgment as a matter of law with respect to his state law battery claim.

the light most hospitable to the party that prevailed at trial." *Iacobucci v. Boulter,* 193 F.3d 14, 23 (1st Cir.1999); *see also Borges Colón v. Román-Abreu,* 438 F.3d 1, 18 (1st Cir.2006) (citing *Iacobucci*). In such an analysis, "deference should be accorded to the jury's discernible resolution of disputed factual issues." *Iacobucci,* 193 F.3d at 23. Thus, where the jury has issued a general verdict, as it did here, we "view[] the facts in the light most favorable to the verdict." *Whitfield v. Meléndez-Rivera,* 431 F.3d at 8. This view of the facts persists throughout the three prongs of the qualified immunity analysis. *See Borges Colón,* 438 F.3d at 19 (rejecting, on the third prong of the qualified immunity analysis, a factual scenario proposed by defendants on the ground that "a jury easily could have found that this was not so").

In this case, we must take this approach with respect to a critical factual dispute: whether Jones *increased* the force he applied after Jennings already had ceased resisting for several seconds. Jennings' claim of excessive force does not rest on the allegation that Jones merely *used* the ankle turn control technique, but rather that Jones *increased* the amount of force he applied after Jennings had stopped resisting and stated that Jones was hurting his previously injured ankle. Indeed, this theme of increased force by Jones without justification was the core of Jennings' case.

Jennings' opening statement immediately described this version of events to the jury. His attorney stated: "[O]ther witnesses will say that [Jennings] was warning [Jones] that he was breaking his leg.

The evidence will show that . . . the way [Jones] responded to that information was to twist harder, even though there was no reason to be twisting at all." At trial, three witnesses testified about Jones' restraint of Jennings. Jennings himself testified: "It was almost, not just incremental . . . I'm telling the guy, look, you're going to break my ankle and so forth, and he twisted it more." Similarly, Domingo Monroe, who was seated across the room when the struggle occurred, testified: "Adam Jennings said, you're hurting my ankle, it was already injured at one point in time . . . and then the officer said, well . . . if you wouldn't resist, then your ankle . . . wouldn't be hurting, and then as he said that, he cranked down harder on the ankle." Finally, Daniel Piccoli testified that he observed the struggle through the open door of the smoke shop:

> Q: Mr. Piccoli, could you describe the movements, if any, of the person who was on the floor?
>
> A: There weren't any.
>
> . . .
>
> Q: Did there come a point in time when you heard the person on the floor say something?
>
> A: Yes.
>
> Q: What did you hear him say?
>
> A: He said something in regard to, "let go, you're going to break my ankle."

> Q: And what, if anything, did the officer who was holding onto his ankle do?
>
> A: Just twisted more.

Jennings' attorney emphasized this increased use of force in his closing argument:

> Now, Adam Jennings himself has testified that he was on the floor, he was saying to somebody . . . you're breaking my ankle or I just had surgery. And you heard testimony that the immediate response was [] a greater application of force than there already had been, you heard that from Dan Piccoli.

Near the end of the closing argument, Jennings' attorney returned to this theme:

> [Jones] never increased his force, he said, never decreased it. Now you tell me, if you've got constant force on somebody's ankle and their foot, why at some point does it break? . . . [D]id Trooper Jones who had Adam Jennings totally under control, lose it and just decide that because this guy was still complaining, that he was going to teach him a little bit of a lesson and put a little bit more pressure on.

As highlighted by the arguments of counsel,[9] the consistent testimony from Jennings and two

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[9] Our conclusion that a reasonable jury could have found that Jones increased the force he used after Jennings had

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eye-witnesses would allow a reasonable jury to conclude that Jones *increased* the force he used to restrain Jennings after Jennings had already ceased resisting. This version of events correctly construes the facts "in the light most favorable to the verdict." *Whitfield,* 431 F.3d at 8.

The district court failed to view the facts in this light. In its written decision granting judgment as a matter of law to Jones on the basis of qualified immunity, the district court stated that the testimony of the police officers was more credible than the contrary testimony of Jennings, Piccoli and Monroe. Therefore, it did not believe that "Jones continued to twist Jennings' ankle *after* Jennings had stopped resisting and was under control." (Emphasis in original.) However, the district court also correctly noted that it could not grant judgment as a matter of law on that basis. *See* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2524 (2d ed.1995) (explaining that, in granting judgment as a matter of law, a court "is not free to weigh the parties' evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury.") (internal footnotes omitted). Instead, the court

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already ceased resisting is based on the principle that we must view the evidence in the light most favorable to the jury verdict. This conclusion does not depend on the substance of the opening statements and closing arguments. However, the opening statements and closing arguments emphasize that this principle is consistent with the way that the case was argued to the jury.

granted judgment as a matter of law on the basis of qualified immunity, finding that Jennings had not presented evidence from which the jury could conclude that the force used to subdue Jennings was excessive, and that, in any case, Jones was entitled to qualified immunity because the relevant law was not clearly established and a reasonable officer would not have believed that the force was excessive and thus in violation of the Fourth Amendment.

We reserve discussion of the court's ultimate ground for granting judgment as a matter of law for our qualified immunity analysis in the next section of this opinion. Here, we wish only to emphasize an important inconsistency in the district court's analysis of the evidence. The court acknowledged that it could not supplant the jury's view of the facts with its own. Assessing credibility was the jury's role, and, as the court also acknowledged, the evidence permitted a reasonable finding by the jury that Jones increased the force he used after Jennings had ceased resisting. Yet the district court's qualified immunity analysis incorporated its skepticism about the jury's fact-finding on the critical issue of whether Jones increased his use of force. At one point, the court stated in its decision that "the jury determined that Jones' *use* of the ankle turn control technique amounted to excessive force." (Emphasis added.) Later, it referred to Jones "maintaining" the ankle hold after Jennings ceased resisting. Given the witness testimony discussed above, the district court's characterization is incomplete. Jennings and his two witnesses testified

that Jones *increased* his force after Jennings ceased resisting, and we adopt this view of the evidence in accordance with the principle that we take facts in the light most favorable to the verdict.

The dissent intimates that the jury's fact-finding role may be different in a case involving qualified immunity, noting our prior statement that "the Supreme Court has not clearly indicated whether the judge may act as fact-finder when there is a factual dispute underlying the qualified immunity defense or whether this function must be fulfilled by a jury." *Kelley v. LaForce,* 288 F.3d 1, 7 n. 2 (1st Cir.2002). The dissent also claims that, by taking the facts in the light most favorable to the jury verdict, we engage in "a bit of legal fiction." It argues that we have no way of knowing what facts the jury found, and lists the various factual scenarios that the jury might have found in a lengthy footnote.[10] Finally, it

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[10] To buttress this criticism, the dissent relies on an idiosyncratic and distinguishable case. In *Iacurci v. Lummus Co.,* 387 U.S. 86, 86-87, 87 S.Ct. 1423, 18 L.Ed.2d 581 (1967), the jury was instructed that, if it found that a "hoist" was negligently designed, it should indicate which of five specified design aspects was found unsafe by answering "yes" or "no" to five questions on a special interrogatory form. The jury found negligent design, but answered only one question in the affirmative, leaving the other four blank. *Id.* at 87, 87 S.Ct. 1423. From this lack of response, the appellate court concluded that the jury would have answered the other four questions in the negative. *Id.* The Supreme Court stated that it did not "share the Court of Appeals' confidence as to the meaning" of the jury verdict, explaining that "[p]erhaps the jury intended to resolve these questions in respondent's favor; but the jury might have been

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suggests that the jury may have reached a compromise verdict.[11]

The dissent's speculations ignore the fundamental principle that, in civil actions, our federal judicial system "distributes trial functions between judge and jury and, under the influence – if not the command – of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996) (citation omitted). Indeed, we acknowledged this principle in *Kelley* by stating that "when facts are in dispute, 'we doubt the Supreme Court intended this dispute to be resolved from the bench by fiat.'" *Kelley*, 288 F.3d at 7 n. 2 (quoting *Prokey v. Watkins*, 942 F.2d 67, 72 (1st Cir.1991)). Consistent with this principle, other courts have taken the facts in the light most favorable to the jury verdict in reviewing a district court's grant of judgment as a matter of law in cases

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unable to agree on these issues, or it simply might not have passed upon them because it concluded that respondent had negligently designed the hoist in another respect." *Id.* at 87-88, 87 S.Ct. 1423. In *Iacurci*, the jury's lack of response to a set of specific instructions made it impossible either to "take the facts in the light most favorable to the verdict," *Whitfield*, 431 F.3d at 8, or to extract the jury's "discernible resolution of disputed factual issues," *Iacobucci*, 193 F.3d at 23. Such circumstances are not present here, where the jury issued a general verdict in favor of Jennings and we are bound, by numerous precedents, to take the facts in the light most favorable to that verdict.

[11] The jury found for defendants on five other claims, indicating that it carried out its responsibilities carefully. Any judgment beyond that is pure speculation.

involving qualified immunity. *See, e.g., Settlegoode v. Portland Pub. Schs.,* 371 F.3d 503, 503 (9th Cir.2004) ("Many facts were hotly disputed at trial. We state them here consistent with the verdict."); *Tamez v. City of San Marcos,* 118 F.3d 1085, 1091 (5th Cir.1997) ("[W]e consider all of the evidence in the light most favorable to the nonmoving party."); *Henderson v. DeRobertis,* 940 F.2d 1055, 1057 (7th Cir.1991) ("We must view all the evidence and inferences in the light most favorable to [plaintiffs], who prevailed with the jury; any conflicts in the evidence must be resolved in favor of those [plaintiffs] and every permissible inference must be drawn in their favor.").

In this case, the only view of the evidence consistent with the principle that we take the facts in the light most favorable to the jury verdict is that Jones increased the force he used to restrain Jennings after Jennings had ceased to resist and after Jennings had announced his prior ankle injury. That increased use of force broke Jennings' ankle. Our acceptance of these facts is no legal fiction. It is an acknowledgment of the deference that we must give to juries in the performance of their fact-finding role.

With this controlling legal principle in mind, and the view of the evidence required by that principle, we turn to the legal question of Jones' entitlement to qualified immunity. Our review is de novo. *Whitfield,* 431 F.3d at 6.

III.

The Supreme Court explained the process for determining qualified immunity in *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). *Saucier* held that a court first must determine whether "the facts alleged show the officer's conduct violated a constitutional right." *Id.* at 201, 121 S.Ct. 2151. Second, the court must determine whether the right was "clearly established" so that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 201-02, 121 S.Ct. 2151. The Supreme Court emphasized that the constitutional question must be decided before determining whether the right was clearly established to facilitate the elaboration of the law. *See id.* at 201, 121 S.Ct. 2151.

We have typically applied *Saucier* using a three-part test in which we inquire:

> (1) whether the claimant has alleged the deprivation of an actual constitutional right; (2) whether the right was clearly established at the time of the alleged action or inaction; and (3) if both of these questions are answered in the affirmative, whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right.

Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 141 (1st Cir.2001); *see also Wilson v. City of Boston,* 421 F.3d 45, 52 (1st Cir.2005). Although this inquiry subdivides the second prong of the *Saucier* analysis into

two separate questions, it is functionally identical to that analysis. Thus, we turn to this three-pronged inquiry, mindful of our obligation to evaluate any disputed evidence in the light most favorable to the jury verdict. Specifically, as we have already explained, we must take the view that Jones increased the pressure on Jennings' ankle after Jennings stopped resisting the officers and stated that the force used was hurting his previously injured ankle.

A. Prong One: The Constitutional Violation

In granting Jones' motion for judgment as a matter of law, the district court indicated that Jennings had not presented sufficient evidence for a reasonable jury to find that Jones had used excessive force in violation of the Constitution.[12] To explore this question, we must first examine what constitutes excessive force under the Fourth Amendment, and then determine whether the evidence presented here was sufficient to support the jury verdict.

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[12] Appropriately, the jury was not asked to address the qualified immunity issue. Nevertheless, in delivering the general verdict on Jennings' claim of excessive force under the Fourth Amendment, the jury essentially was addressing the first prong of the qualified immunity inquiry. Because we now address the question of qualified immunity after this jury verdict for the plaintiff, our task on the first prong of the qualified immunity analysis is to "inquire whether the evidence at trial, viewed in the light most favorable to the verdict, is legally sufficient to support the jury's verdict that the plaintiff was deprived of a constitutional right." *Wilson*, 421 F.3d at 54.

To establish a Fourth Amendment violation based on excessive force, a plaintiff must show that the defendant officer employed force that was unreasonable under the circumstances. *See Graham v. Connor,* 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Whether the force used to effect a particular seizure is reasonable "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396, 109 S.Ct. 1865. The reasonableness inquiry is objective, to be determined "in light of the facts and circumstances confronting [the officers], without regard to their underlying intent or motivation." *Id.* at 397, 109 S.Ct. 1865. There must be "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396, 109 S.Ct. 1865.

We recognize the difficult situation confronting the police. It is undisputed that Jennings was challenging authority and resisting arrest. For much of the struggle, the police could not see Jennings' hands, and they reasonably could have believed that he might have a weapon. In making an arrest, a police officer has "the right to use some degree of physical coercion or threat thereof to effect it." *Id.* The fact that Jennings' ankle was broken does not, in itself, prove a constitutional violation: "[T]he use of force is an expected, necessary part of a law enforcement

officer's task of subduing and securing individuals suspected of committing crimes." *Lee v. Ferraro,* 284 F.3d 1188, 1200 (11th Cir.2002).

However, the focus of Jennings' excessive force claim was not merely Jones' use of force, but rather Jones' *increased* use of physical force after Jennings had ceased resisting for several seconds and stated that the force Jones was using was hurting his previously injured ankle. Jennings used one of Jones' own witnesses to help establish that such force was unreasonable. Defendants initially called Officer Delaney, an instructor at the Rhode Island State Police Training Academy, to provide testimony about the training of officers and the use of various restraint techniques. During Jennings' cross-examination the parties agreed to treat Delaney as an expert witness.[13] Delaney testified that the ankle turn control

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[13] During the government's direct examination of Delaney, Jennings' attorney objected to certain questions because Delaney had not been qualified as an expert. The record does not disclose why the government had not qualified Delaney as an expert, but the court sustained Jennings' objections on these grounds. However, on cross-examination Jennings' attorney also attempted to ask Delaney questions that would ordinarily require expert qualifications. When the government objected, Jennings' attorney indicated that he now wanted Delaney to be qualified as an expert. The court stated that if Jennings wanted to use Delaney as an expert, the government would also have the opportunity, on redirect, to ask the questions requiring expert qualifications to which Jennings had originally objected. The parties agreed to this arrangement, and the court subsequently allowed both parties to use Delaney as an expert.

technique is taught to police officers as "a compliance technique and a restraint technique devised to control somebody from kicking." These techniques are taught in conjunction with the "Use of Force Continuum," a chart explaining that the degree of force that an officer uses should correlate with the degree of resistance offered by the arrestee. On cross-examination, Delaney testified that it was appropriate for an officer to continue to apply the ankle turn control technique after a suspect stops kicking:

> Q: [If] Adam Jennings is not kicking and his hands have been put behind his back and officers are attempting to put the flex cuffs on him . . . would it be appropriate for an officer in the position of Trooper Jones to still be twisting his ankle?
>
> A: It would be appropriate for him to *maintain* that control over the leg.

(Emphasis added.)

However, Delaney's testimony about the continuum of force also supports the view that it would be unreasonable for an officer to *increase* his use of force when an arrestee has ceased to resist. Delaney testified during cross-examination that the continuum of force was a "two way street," meaning that, if the level of resistance changes, the level of force should be adjusted upward or downward correspondingly:

> Q: [E]ven if an officer feels at one point in time that one level of force is appropriate, he is supposed to adjust the amount of force he

> uses in response to a lessening of the arrestee; isn't that true?
>
> A: Yes. That would be the Trooper's own assessment of where that lies, yes, sir.

Still on cross-examination, Delaney testified further:

> Q: You don't get stuck at any level, an officer has to be cognizant of what's going on during the arrest and adjust his use of force accordingly, right?
>
> A: Correct.

The district court's jury instructions noted that a factor in determining excessive force is whether "the degree of force used and also whether the degree of force was proportional to what was appropriate under the circumstances." Moreover, Jennings' closing argument specifically connected the content of Delaney's testimony to Jones' increased use of force:

> Now, the Judge is going to instruct you that, as does the Use of Force Continuum . . . what goes up can come down and should come down if there's no need any longer to be applying that kind of force. Now, Adam Jennings himself has testified that he was on the floor, he was saying to somebody . . . you're breaking my ankle or I just had surgery. And you heard testimony that the immediate response was [] a greater application of force than there already had been. . . .

Thus, guided by the court's instructions on proportional force, the jury could conclude from Delaney's testimony that it would have been unreasonable for an officer to *increase* the pressure on Jennings' ankle several seconds after Jennings stopped resisting arrest and, moreover, stated that the pressure already applied was hurting his previously injured ankle.

The district court considered Delaney's testimony. It noted that "Delaney did acknowledge that the continuum of force was a 'two-way street,' meaning that, if the level of resistance changes, the level of force used should be adjusted upward or downward to correspond to what is appropriate at the level of resistance." Critically, though, the court failed to relate Delaney's testimony to the view of the evidence that we must take in light of the jury verdict. It explained that "Delaney testified that it would have been appropriate for Jones to *maintain* the ankle turn control technique even if Jennings was not kicking and the officers were 'just trying to get the flex cuffs on him.'" (Emphasis added.) However, Jones did not simply *maintain* the ankle turn control technique after Jennings gave up resistance; rather, he increased pressure to the point that he broke Jennings' ankle.

In finding that a reasonable jury could not have concluded that Jones used excessive force, the district court relied on our decision in *Isom v. Town of Warren,* 360 F.3d 7 (1st Cir.2004). In that case, the police used pepper spray on Robert Isom, a "distraught,

seemingly suicidal man, who had briefly held two hostages and was refusing to comply with continuous officer requests that he put down an axe." *Id.* at 11. After the spray stopped, Isom "responded not by dropping to the ground, as the officer had hoped, but by raising the axe and running toward two officers." *Id.* at 8. The officers then shot and killed Isom. *Id.*

At trial, the representative of Isom's estate argued that the use of pepper spray in that situation was "a colossal misjudgment, resulting in a needless and wrongful death," and that no reasonable officer would have used pepper spray under such circumstances. *Id.* However, we found this argument inadequately supported because "[i]n the presence of such danger, the plaintiffs could not prevail at trial without providing evidence that would bring into question the officers' judgment call to use pepper spray." *Id.* at 11. Because the plaintiff did not present any such evidence, we found that "[t]here was no evidence from which the jury could rationally draw the conclusion that the officers' actions were objectively unreasonable." *Id.* at 12.

The district court held that this case is "markedly similar to *Isom*," quoting *Isom*'s explanation for finding that the plaintiff had not presented sufficient evidence:

> No expert testified that, under the circumstances faced by Detective Clancy, no reasonable officer would have used pepper spray; in fact, the plaintiffs did not produce any expert testimony at all. Nor did the

> plaintiff produce any written policy or text stating that the use of pepper spray in circumstances such as those faced by Clancy was not reasonable.

Id. The district court also emphasized *Isom*'s holding that, "[f]or the jurors to have been given an opportunity to exercise their common sense on the ultimate question of whether no objectively reasonable officer would have used pepper spray, there must have been some basis in the evidence on which to ground that determination." *Id.* Relying on these propositions from *Isom,* the district court found that there was an absence of any evidence that 'no objectively reasonable officer' would have used the level of force used by Jones and, therefore, the jury unfairly was put in the untenable position of trying to decide that question without sufficient evidence of the applicable standard for measuring the lawfulness of Jones' conduct.

As a result, the district court concluded that in this case, as in *Isom,* there was no basis in the evidence to support a jury finding of excessive force.[14]

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[14] The dissent claims that we do a "disservice" to the district court by stating that the district court would have reached a different conclusion from the jury on the excessive force issue. However, the district court explicitly included in its qualified immunity analysis the conclusion that "Jennings failed to present any evidence that Jones' actions deviated from the standard of conduct that should have been expected from an objectively reasonable police officer under the circumstances." This statement is equivalent to a holding that there was no excessive force.

Contrary to the district court's assessment, this case differs from *Isom* in two important respects. First, in contrast to the plaintiff in *Isom,* Jennings did provide expert testimony about the use of force. He directed the jury to the testimony of Officer Delaney on the Use of Force Continuum, a concept relevant to the court's own instructions about the proportionality of force under the circumstances. As described above, Jennings' closing argument emphasized that "the Judge is going to instruct you that, as does the Use of Force Continuum, like I said, what goes up can come down and should come down if there's no need any longer to be applying that kind of force." Thus, unlike the plaintiff in *Isom,* Jennings explicitly directed the jury to expert testimony in the record that could assist the jury in determining that no reasonable officer under the circumstances Jones confronted would have applied more pressure to Jennings' ankle.

We acknowledge that the expert testimony in this case was not precisely the sort described in *Isom.* As the district court noted, "[n]o expert testified that, under the circumstances faced by [Jones], no reasonable officer would have" acted as Jones did. *Isom,* 360 F.3d at 12. In fact, Delaney testified to the contrary on redirect examination by the government:

> Q. Did Officer Ken Jones use force that you would consider reasonable under the circumstances?
>
> A. Yes.

However, Officer Delaney's testimony in response to the next few questions makes clear that he did

not make his assessment with the relevant factual circumstances in mind. When asked what factors informed his finding of reasonableness, Delaney explained:

> The fact that, you know, the suspect did not comply with the order of arrest, that he was assaultive, he was trying to kick the Trooper and he was offering enhanced defiance by bringing his arms in, *at that point* the appropriate application of force, which was the technique employed by Trooper Jones.

(Emphasis added.) The factors Delaney lists all occurred prior to the time that Jennings ceased to resist, and Delaney's testimony thus indicates only that the use of force was reasonable "at that point" in time. Given that, viewing the evidence in the light most favorable to the verdict, Jones increased the force he used after Jennings ceased resisting, Delaney's expert testimony about the Use of Force Continuum actually supports a finding that the force Jones used was excessive.

Second, although this case happened to include expert testimony by Officer Delaney, we do not read *Isom* to require such testimony to support a finding that an officer's use of force was unreasonable.[15] *Isom*

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[15] Jennings argues that the district court erred in requiring expert testimony to prove excessive force. However, the district court did not actually impose this requirement. Instead, it noted that the jury had to have "sufficient evidence of the applicable standard for measuring the lawfulness of Jones' conduct." We

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requires only that "there must have been some basis in the evidence on which to ground" a finding of excessive force, leaving open the possibility that some cases may be susceptible to a common sense determination by the jury. *Isom* itself involved pepper spray, a substance whose use may be unfamiliar to many jurors, and consequently the question of whether it is reasonable to use pepper spray in an attempt to subdue a distraught but threatening suspect may have been best addressed through expert testimony. By contrast, this case involves the common sense proposition that it is not reasonable for police officers to increase their use of physical force after an arrestee who has been resisting arrest stops resisting for several seconds and warns the officers that they are hurting his previously injured ankle. Although Officer Delaney did not offer expert testimony that no reasonable officer would have acted as Jones did under the circumstances, he did offer expert testimony that gave the jury a useful framework for thinking about the excessive force issue. Thus informed, the jurors were in a better position to apply their common sense to the facts of this case.[16]

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read this as a requirement that Jennings produce *some* evidence, whether in the form of expert testimony, lay testimony, or other evidence, from which the jury could evaluate the reasonableness of Jones' conduct.

[16] We are not suggesting that Officer Delaney's expert testimony was or was not essential to the submission of the excessive force issue to the jury. We are simply explaining how that testimony might have been useful to the jury in this case.

Other courts have recognized that some factual scenarios permit common sense determinations by the jury as to whether the police used excessive force. In *Kopf v. Skyrm,* 993 F.2d 374, 379 (4th Cir.1993), the Fourth Circuit noted:

> [A] blanket rule that expert testimony is generally admissible in excessive force cases would be just as wrong as a blanket rule that it is not.
>
> The facts of every case will determine whether expert testimony would assist the jury. Where force is reduced to its most primitive form – the bare hands – expert testimony might not be helpful.

See also Adewale v. Whalen, 21 F.Supp.2d 1006, 1014 (D.Minn.1998) ("If plaintiff's version of the facts is believed, the jury could conclude without expert testimony that [defendant] used excessive force, and that his actions caused plaintiff's broken arm."). This case, involving force applied with bare hands, did not require expert testimony to establish whether the force used was reasonable.

In keeping with our decision in *Isom,* a reasonable jury could have exercised its common sense, informed by Officer Delaney's expert testimony, to find that Jones used excessive force by increasing pressure on Jennings' ankle after Jennings stopped resisting for several seconds and stated that Jones was using force that hurt his previously injured ankle. Consequently, we conclude that Jones violated

Jennings' Fourth Amendment right to be free from an unreasonable seizure.

B. Prong Two: Whether the Law Was Clearly Established

The second prong of the qualified immunity analysis asks "whether the constitutional right . . . was 'clearly established' at the time of the incident such that it would 'be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Riverdale Mills Corp. v. Pimpare,* 392 F.3d 55, 65 (1st Cir.2004) (quoting *Saucier,* 533 U.S. at 202, 121 S.Ct. 2151). We consider whether existing case law gave the defendants "fair warning that their conduct violated the plaintiff's constitutional rights." *Suboh v. Dist. Attorney's Office of Suffolk,* 298 F.3d 81, 93 (1st Cir.2002). In other words, the law is clearly established either if courts have previously ruled that materially similar conduct was unconstitutional, or if "a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct" at issue. *United States v. Lanier,* 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997). We therefore consider whether materially similar cases or general Fourth Amendment principles gave Jones fair warning that it was unconstitutional for police officers to increase their use of physical force after an arrestee who has been resisting arrest stops resisting for several seconds and warns them that they are hurting his previously injured ankle.

We conclude that Jones had such notice. In *Smith v. Mattox,* 127 F.3d 1416 (11th Cir.1997), the Eleventh Circuit denied qualified immunity to a police officer accused of breaking the plaintiff's arm while putting on handcuffs.[17] According to the plaintiff, he was at his mother's house when a uniformed police officer, acting on a tip from an informant, entered the yard. The plaintiff then "raised [a] baseball bat in a threatening posture" and ignored the officer's order to drop it. *Id.* at 1418. When the officer threatened to shoot, the plaintiff fled. He soon encountered the police officer again, and then plaintiff "docilely submitted to arrest upon [the officer's] request for him to 'get down.'" *Id.* In the process of putting on handcuffs, the officer bent the plaintiff's arm in a way that caused discomfort. *Id.* When the plaintiff complained, the police officer, "with a grunt and a blow – but no sign of anger," broke his arm so severely that it required surgery for multiple fractures. *Id.* The court concluded that such use of force would be excessive and that the officer was not entitled to qualified immunity. *Id.*

Although *Smith* helps to demonstrate that the law protecting Jennings from Jones' increased use of

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[17] Since the court's ruling was made in the context of summary judgment, it took the facts in the light most favorable to the plaintiff. 127 F.3d at 1417. The point seemingly made by the dissent about this case (that a jury might not ultimately find those facts) does not undermine the value of the case as indicative of clearly established law.

force was clearly established, our conclusion does not depend on this strikingly similar case. Instead, *Smith* emphasizes the obvious unconstitutionality of increasing the force used on an arrestee to such a degree that a broken ankle results, after the arrestee has ceased resisting for several seconds and stated that the force already used is hurting his previously injured ankle. The Supreme Court has explained that

> general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'

Lanier, 520 U.S. at 271, 117 S.Ct. 1219 (1997) (citation omitted). Accordingly, we conclude that Jones' conduct was such an obvious violation of the Fourth Amendment's general prohibition on unreasonable force that a reasonable officer would not have required prior case law on point to be on notice that his conduct was unlawful. Indeed, even in *Smith,* which was decided six years before the incident at issue here, the court concluded that the law was clearly established against the use of increased force on a suspect no longer offering resistance because "the

unlawfulness of the conduct is readily apparent even without clarifying caselaw." 127 F.3d at 1420.[18]

Other circuits have rejected qualified immunity without a prior case exactly on point. In *Rice v. Burks,* 999 F.2d 1172 (7th Cir.1993), the Seventh Circuit noted that a plaintiff can defeat a qualified immunity defense

> without identifying a closely analogous case if he show[s] that the force used was so plainly excessive that the police officers should have been on notice that they were violating the Fourth Amendment. Indeed, police officers should not be shielded from liability just because their excessive use of force happens to be original.

Id. at 1174 (internal citations omitted). Similarly, other courts have found that case law is not required where the constitutional violation is obvious. *See, e.g.,*

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[18] The dissent misconstrues the Supreme Court's precedents relating to qualified immunity when it states that "[t]he very fact-intensive nature of the test for excessive force itself requires particularized prior case law." It is true that the "*right* allegedly violated must be defined at the appropriate level of specificity before a court can determine if it is clearly established," *Wilson v. Layne,* 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (emphasis added), but this requirement does not imply that the relevant *case law* must be particularized to address the alleged violation. Rather, once the right allegedly violated has been defined, the court must examine whether "the unlawfulness of particular conduct will be apparent *ex ante* to reasonable public officials." *See Brady v. Dill,* 187 F.3d 104 (1st Cir.1999) (citing *Wilson,* 526 U.S. at 613, 119 S.Ct. 1692).

Gray ex rel. Alexander v. Bostic, 458 F.3d 1295, 1306 (11th Cir.2006) (rejecting qualified immunity for handcuffing compliant nine-year-old girl because "[e]ven in the absence of factually similar case law, an official can have fair warning that his conduct is unconstitutional when the constitutional violation is obvious"); *Smith,* 127 F.3d at 1419 (stating that law is clearly established when "the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law"); *Casteel v. Pieschek,* 3 F.3d 1050, 1053 (7th Cir.1993) (stating that plaintiffs may show that the violation was clearly established using "either a closely analogous case or evidence that the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts").

Although the dissent professes to accept, arguendo, that Jones increased the force he used to restrain Jennings after Jennings had ceased resisting for several seconds, it continues to describe a different version of events with the cases it cites to show that the law was not clearly established. Some of these cases involve the use, rather than the increase, of force.[19] Others are inapplicable because the

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[19] *Rodriguez v. Farrell,* 294 F.3d 1276, 1278-79 (11th Cir.2002); *Jackson v. City of Bremerton,* 268 F.3d 646, 650-53 (9th Cir.2001); *Eberle v. City of Anaheim,* 901 F.2d 814, 820 (9th Cir.1990).

arrestee was still resistant.[20] Critically, these cases do not address the key conduct at issue here: the increased use of force on a previously resisting but now non-resisting arrestee.[21] The dissent's reliance on such cases demonstrates its refusal to acknowledge that Jones' increased use of force was integral to Jennings' excessive force claim and that, consistent with our obligation to take the facts in the light most favorable to the jury verdict, we must accept this version of the facts in evaluating qualified immunity.

When an individual has been forcibly restrained by several officers, has ceased resisting arrest for several seconds, and has advised the officers that the force they are already using is hurting a previously injured ankle, we cannot think of any basis for increasing the force used to such a degree that a broken ankle results. At the time of Jones' action, both existing caselaw and general Fourth Amendment principles had clearly established that this use of force was excessive in violation of the Constitution.

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[20] *Huang v. Harris County*, No. 00-20806, 2001 WL 822534 (5th Cir. June 22, 2001) (unpublished disposition); *Brownell v. Figel*, 950 F.2d 1285, 1288, 1293 (7th Cir.1991).

[21] Indeed, the dissent's insistence on "particularized prior cases with similar facts," *see supra* note 18, is inconsistent with its use of these cases, which, for the reasons already stated, differ significantly from the circumstances present here.

D. Prong Three: Whether a Reasonable Officer Would Have Believed a Violation Occurred

The final prong of the qualified immunity analysis is "whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right." *Starlight,* 253 F.3d at 141. As we have previously explained, "[i]t is not always evident at the time an official takes an action that a clearly established right is involved. For example, the factual situation might be ambiguous or the application of the legal standard to the precise facts at issue might be difficult." *Riverdale Mills,* 392 F.3d at 61. Thus, even if an officer's conduct violated clearly established Fourth Amendment law, he may still be eligible for qualified immunity if he was reasonably mistaken as to the degree of force he should have used.

At first glance, this inquiry appears indistinguishable from that in the first prong. Both involve the reasonableness of the officer's conduct. However, the key distinction is that prong one deals with whether the officer's conduct *was* objectively unreasonable, whereas prong three deals with whether an objectively reasonable officer would have *believed* the conduct was unreasonable. *See Saucier,* 533 U.S. at 204-05, 121 S.Ct. 2151 (explaining that "claims of excessive force in the context of arrests . . . should be analyzed under the Fourth Amendment's 'objective reasonableness standard'" but that "[i]f the officer's mistake as to what the law requires is reasonable . . .

the officer is entitled to the immunity defense" (internal citation omitted)).

The third prong analysis seems nonsensical at first blush because, in effect, officers receive protection if they acted reasonably in exercising unreasonable force. In *Anderson v. Creighton,* 483 U.S. 635, 643, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Supreme Court acknowledged the argument made by the appellant in that case that "[i]t is not possible . . . to say that one 'reasonably' acted unreasonably." However, the Court excused this apparent contradiction as merely linguistic, explaining:

> We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Id. at 644, 107 S.Ct. 3034 (internal citation omitted). Thus, qualified immunity affords protection to officers who reasonably, yet mistakenly, employ excessive force in violation of the Fourth Amendment.

Again, we are sympathetic to the situation that Jones confronted. Jennings had to be subdued while he was resisting arrest, and the chaos caused by his struggle may have made it difficult for Jones to gauge the appropriate level of force. These circumstances

would arguably allow a reasonable officer in Jones' circumstances to believe that it was lawful to *maintain* the level of force he used even after Jones ceased resisting.

However, we reiterate that we must take the facts in the light most favorable to the jury verdict. *See, e.g., Iacobucci v. Boulter,* 193 F.3d 14, 23 (1st Cir.1999). Thus, we accept that Jones increased, rather than merely maintained, the force he applied to Jennings' ankle, even after Jennings had ceased resisting and stated that Jones was hurting his previously injured ankle.[22]

Under such circumstances, even the "added measure of protection" provided by the third prong of the qualified immunity analysis does not insulate Jones from damages. *Cox v. Hainey,* 391 F.3d 25 (1st Cir.2004). We find that an objectively reasonable officer in Jones' circumstances would not have believed that it was lawful to *increase* the amount of force that he used after Jennings ceased resisting and stated that Jones was hurting him.[23]

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[22] *See supra* Section II for a description of the evidence on this point.

[23] The dissent argues that Jones' use of force was justified because Jennings was not totally secured at the time his ankle was broken and the officers were having a difficult time getting the flex cuffs on Jennings. The more important point, however, is that Jennings had ceased resisting before Officer Hill got up and walked away, and, as shown on the video, several seconds elapsed between the time that Officer Hill left and the time that

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Because the first and third prongs of the qualified immunity analysis are so closely related in these Fourth Amendment excessive force cases, the evidence that supports our conclusion on the first prong, that a reasonable jury could have found that the force Jones used was unreasonable, is likewise relevant here, on the third prong, to demonstrate that an objectively reasonable officer in Jones' position would have believed that the force used was unreasonable. More specifically, Officer Delaney's testimony about the training that officers receive and the Use of Force Continuum is relevant both to the prong one question of whether there was a violation at all and to the prong three question, which we address here, of whether a reasonable officer in Jones' circumstances would have believed that his conduct violated the Constitution.

Officer Delaney's testimony about the training that officers undergo and the Use of Force Continuum made clear that officers should adjust their force in a manner proportional to the resistance offered by the

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Jennings yelled in pain as his ankle was broken. Thus, any difficulty or delay that the officers experienced in handcuffing Jennings was not due to resistance on Jennings' part, and does not alter our conclusion that an objectively reasonable officer in Jones' circumstances would not have believed that it was lawful to *increase* force after Jennings ceased resisting and stated that the restraint was hurting his previously injured ankle. Relatedly, the dissent's statement that "Hill got out of the way because other officers were having trouble cuffing Jennings" incorrectly suggests that Jennings was still resisting when Hill got up and walked away.

arrestee. Instead, Jones adjusted his force inversely, increasing the force he used after Jennings stopped resisting and stated that the restraint was causing him pain. Under such circumstances, a reasonable officer would have believed that increasing his use of force would violate Jennings' constitutional right to be free from excessive force.[24]

The district court concluded that Jones was entitled to qualified immunity because a reasonable officer in his position would not have believed that his conduct violated Jennings' constitutional rights. However, this conclusion again indicates that the court did not construe the facts in the light most favorable to the jury verdict. In discussing the third prong of the qualified immunity analysis, the court stated that "the evidence clearly demonstrates that, even if he was mistaken, Jones reasonably could have believed that his *utilization* of the ankle turn control technique was lawful." (Emphasis added.) As we have repeatedly emphasized, the conduct at issue was not the mere *utilization* of the technique, but rather the

[24] In our discussion of prong one, we were careful to point out that we were not suggesting that Delaney's testimony was or was not essential to the jury's determination that the force used by Jones was excessive. We simply explained how that testimony could have been helpful to the jury in reaching its excessive force verdict. We make a similar point here. The Delaney testimony is certainly relevant to the prong three determination that was to be made by the court: whether a reasonable official would have believed that the force being used was excessive. However, we are not suggesting that this testimony was or was not essential to that legal determination.

increase of force after Jennings ceased resisting. It is this increased force that an objectively reasonable officer would not have believed was lawful.

The dissent once again avoids the central issue – Jones' use of increased force on a nonresisting arrestee – by describing Jones' conduct and Delaney's testimony in sanitized terms. It states that "Jones testified that he tried to *secure* Jennings' ankle," emphasizes Delaney's testimony that "it was appropriate for Jones to continue *using* the same compliance technique," and refers repeatedly to the "use" of the ankle turn control technique. (Emphases added.) These characterizations ignore the view of the facts we must take in light of the jury verdict and, consequently, result in a misapplication of the qualified immunity analysis.

In light of the circumstances, we hold that a reasonable officer in Jones' position would have believed that increasing the force with which he restrained Jennings was a violation of Jennings' constitutional right to be free from excessive force. Thus, Jones is not entitled to qualified immunity.

We conclude that the district court erred in granting judgment as a matter of law to appellee Jones based on qualified immunity. Jones' use of increased force after Jennings ceased resisting violated the Fourth Amendment, the law was clearly established, and a reasonable officer in Jones' circumstances would have believed that his conduct was a

violation. Therefore, we vacate the district court's decision on that motion and reinstate the jury verdict.

At the close of trial, in addition to his motion for judgment as a matter of law, Jones filed alternative motions for a new trial and a remittitur. After granting his motion for judgment as a matter of law, the district court held that the alternative motions were moot. This holding was error. Federal Rule of Civil Procedure 50(c)(1) requires the district court to rule conditionally on such motions in the event that the grant of judgment as a matter of law is overruled on appeal.

We now remand to the district court for a ruling on the undecided motions. However, since we already have vacated the district court's ruling on Jones' motion for judgment as a matter of law, its ruling on the other motions will not be conditional. Instead, it will control the future course of proceedings. We do not retain jurisdiction over the case.

So ordered.

LYNCH, Circuit Judge, dissenting. With respect, I dissent.

The majority opinion holds that a trial court, to whom the ultimate decision on qualified immunity is granted, erred in granting qualified immunity; it committed error, the majority says, because a jury found by a general verdict that Officer Jones had used excessive force.

I. *Relevant History*

It is worth explaining how this situation, which arose from a mistake by the trial judge (which the judge later acknowledged), came to pass.

The plaintiffs were permitted to amend their complaint shortly before the deadline for filing pre-trial motions to give names to the John Doe state trooper defendants, including Officer Jones, and bring suit against them in their individual capacities. By the time of the pre-trial conference, the district court had apparently indicated a disinclination to resolve the matters of defense by summary judgment, noting that light would be shed on the facts at trial.

At the close of the plaintiff's evidence at trial, the officers moved for a ruling on their defenses, including the qualified immunity defense under Rule 50. The district court granted JMOL to defendants on a number of claims but, apparently overlooking the immunity issue, said the remaining claims stated an issue for the jury. At the close of all the evidence, but before the verdict, the remaining defendants renewed their motion for JMOL. The court granted judgment to all but three defendants, including Jones. After the verdict, the court ruled that it had erred in not granting the Rule 50 JMOL motion with respect to the § 1983 excessive force claim and the state law battery claim against Jones. *Jennings v. Pare,* No. 03-572-T, 2005 WL 2043945, at *5 (D.R.I. Aug.24, 2005).

The jury returned a verdict against Jones on the excessive force claim under the Fourth Amendment

and awarded damages of $301,100. The jury verdict simply stated, "As to the claims by Adam Jennings against Kenneth Jones, Fourth Amendment claim for excessive force, the jury finds for the plaintiff, Adam Jennings." There were no special interrogatories which the jury answered to make specific findings of fact.

After the jury verdict, Jones filed three motions: for remittitur under Rule 59(e); for JMOL under Rule 50(b); and for a new trial under Rule 59. The trial court allowed Jones' motion for JMOL and decided that the other two motions were, accordingly, moot. *Id.* at *1. Judgment was entered for Jones simultaneously with the court's ruling on the three motions. In light of the requirements of Rule 50(c)(1), the court erred in holding the new trial motion was moot; it should have ruled on the merits of the new trial motion.

In granting JMOL, the court held that despite the jury verdict Officer Jones was nonetheless entitled to immunity. *Id.* The district court found that, accepting that the force used was unreasonable and excessive, the officer was entitled to immunity under the second and third prongs of the analysis because (1) clearly established law did not fairly warn the officer his actions were unconstitutional, and (2) even if the law was clearly established so as to give the officer fair notice that his actions were unconstitutional, the court still concluded that "Jones reasonably could have believed that his utilization of the

ankle turn control technique was lawful." *Id.* at *10-11.

II. *Qualified Immunity*

Appellate review of the immunity conclusion is de novo. *Whalen v. Mass. Trial Court,* 397 F.3d 19, 23 (1st Cir.2005).

Two particular rules apply in this situation. Under *Hunter v. Bryant,* 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991), the question of immunity is an issue for the trial court, not the jury, to determine. *Id.* at 228, 112 S.Ct. 534. The Supreme Court has not yet addressed the question of what role jury findings play in the judicial immunity determination, nor has this circuit. *See, e.g., Kelley v. LaForce,* 288 F.3d 1, 7 n. 2 (1st Cir.2002) ("[T]he Supreme Court has not clearly indicated whether the judge may act as fact-finder when there is a factual dispute underlying the qualified immunity defense or whether this function must be fulfilled by a jury."); *Ringuette v. City of Fall River,* 146 F.3d 1, 6 (1st Cir.1998) ("Something of a 'black hole' exists in the law as to how to resolve factual disputes pertaining to qualified immunity when they cannot be resolved on summary judgment prior to trial."). No clear answer has emerged from the circuits. *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996), cited by the majority, is not an immunity case and does not resolve this question, which we have

recognized as being open in the years since *Gasperini* was decided.

Secondly, the merits inquiry about whether an officer used excessive force does not resolve the immunity inquiry. *Saucier v. Katz,* 533 U.S. 194, 204-06, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). A holding on the merits is not dispositive of the issue of qualified immunity. *Cookish v. Powell,* 945 F.2d 441, 443 (1st Cir.1991). Thus, whatever deference is owed to the jury findings on prong one of immunity, the court was free to grant immunity, as it did, on prongs two and three. The officer here could both have applied excessive force and, at the same time, be entitled to immunity: an officer in Jones' position could have reasonably believed he was not violating constitutional rights. *Saucier,* 533 U.S. at 206, 121 S.Ct. 2151. The district court recognized this, and there is no inconsistency between its conclusion that Jones is entitled to immunity and the jury verdict.

The district court summarized its reasons for granting immunity[25]:

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[25] Those reasons did not include the fact that the trial court would itself have reached a different conclusion from the jury on the excessive force issue. The district court, based on its own assessments of the credibility of the witnesses and the weight of the evidence, expressed its view that Jones had not used excessive force. *Jennings,* 2005 WL 2043945, at *6. Nonetheless, the district court expressly stated this was not the basis for its immunity holding, acknowledging that a motion for JMOL does not permit a court to make its own assessment regarding the weight of the evidence. *Id.* at *7. The majority, however, states

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> First, Jennings failed to present any evidence that Jones' actions deviated from the standard of conduct that should have been expected from an objectively reasonable police officer under the circumstances. Second, even if Jones' use of the "ankle turn control technique" is viewed as amounting to excessive force it did not violate any "clearly established" constitutional prohibition. Finally, the undisputed evidence demonstrates that it was "objectively reasonable" for Jones to believe that he was acting lawfully.

Jennings, 2005 WL 2043945, at *5.

In reviewing the district court's grant of immunity on JMOL, I assume arguendo that the evidence is taken in the light most favorable to the jury verdict.[26]

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that "the district court's qualified immunity analysis incorporated its skepticism about the jury's fact-finding on the critical issue of whether Jones increased his use of force." The majority does a disservice to the district court by suggesting it did something it expressly said it did not do.

[26] Where we are reviewing a denial of qualified immunity by a judge *which is consistent with a jury verdict,* we have said that "the evidence must be construed in the light most hospitable to the party that prevailed at trial." *Iacobucci v. Boulter,* 193 F.3d 14, 23 (1st Cir.1999); *see also Borges Colón v. Román-Abreu,* 438 F.3d 1, 18 (1st Cir.2006); *Whitfield v. Meléndez-Rivera,* 431 F.3d 1, 6 (1st Cir.2005). We have held that there is no prohibition on a judge's reasonably accepting the jury's findings as his or her own for purposes of qualified immunity. *See Iacobucci,* 193 F.3d at 23. We have never explicitly discussed the reverse situation, where the judge awards immunity in the face of a jury finding that

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A. *Effect of the Jury's Verdict*

Two thoughts should be removed from the picture at the outset. First, Jones did not break Jennings' ankle with reckless or callous indifference to Jennings' federal rights. Second, he did not knowingly violate the law. The jury verdict cannot, as a matter of law, be taken to establish these points because they were not elements of the claim that went to the jury. There was no basis for punitive damages here. *See Smith v. Wade,* 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) (punitive damages under § 1983 available only "when the defendant's conduct ... involves reckless or callous indifference to the federally protected rights of others"). Indeed, the law of this case is that the evidence was insufficient to support such a finding. *See Mandel v. Boston Phoenix, Inc.,* 456 F.3d 198, 210 (1st Cir.2006). Although the amended complaint sought punitive damages, the district court held that there was no basis in the evidence to instruct the jury on the issue. Further, plaintiff did not object to the lack of jury instructions on punitive damages, and he does not challenge the omission of such instructions on appeal. Moreover, on the evidence it is clear that Jones was not "plainly incompetent," and he did not "knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). So denial of immunity cannot rest on those grounds.

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there was a constitutional violation. Jones has not made an argument as to this point, so I bypass it.

In my view, the majority's reversal of the trial judge's grant of immunity undercuts the interests protected by the immunity doctrine. The purposes of granting qualified immunity include: avoiding "excessive disruption of government," *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); giving "a fairly wide zone of protection in close cases," *Roy v. Inhabitants of Lewiston,* 42 F.3d 691, 695 (1st Cir.1994); allowing officers "reasonably [to] anticipate when their conduct may give rise to liability for damages," *Davis v. Scherer,* 468 U.S. 183, 195, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); providing "ample room for mistaken judgments," *Malley,* 475 U.S. at 343, 106 S.Ct. 1092; shielding officers from liability when the law did not clearly proscribe the actions they took, *Mitchell v. Forsyth,* 472 U.S. 511, 528, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); and protecting "all but the plainly incompetent or those who knowingly violate the law," *Malley,* 475 U.S. at 341, 106 S.Ct. 1092. The common theme of protecting reasonable judgment calls by officers, such as this one, exists throughout qualified immunity law.

It is not inconsistent for an officer to have violated constitutional rights, as the jury found here, but still be entitled to immunity on the various prongs (described below) of the immunity test. *See Sallier v. Brooks,* 343 F.3d 868, 871-72, 879-80 (6th Cir.2003) (holding that prison clerks were entitled to immunity despite jury verdict against them because it was not clearly established at the time that mail from the courts was protected "legal mail"); *Figg v. Schroeder,*

312 F.3d 625, 636-37 (4th Cir.2002) (holding that officers were entitled to qualified immunity on first prong of test despite jury verdict because evidence at trial did not establish unreasonableness of seizures under the Fourth Amendment); *Clue v. Johnson,* 179 F.3d 57, 60, 61-62 (2d Cir.1999) (holding that transit authority director was entitled to immunity despite jury verdict for plaintiffs because law was not clearly established at the time that plaintiffs' activities were constitutionally protected from employer retaliation); *Warlick v. Cross,* 969 F.2d 303, 310 (7th Cir.1992) (holding that, although jury found officer not to have had probable cause for arrest, officer was entitled to immunity because law was not clearly established as to circumstances in which officer found himself).

The majority reasons that the jury, by its general verdict, necessarily found that (1) Jennings had stopped resisting and had announced his prior ankle injury, and (2) Jones nonetheless increased the twisting pressure on Jennings' ankle and broke it. The majority's reasoning entails a bit of legal fiction, since we do not know what the jury found and these facts certainly were not necessary to the verdict.[27] On this

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[27] The Supreme Court noted in *Iacurci v. Lummus Co.,* 387 U.S. 86, 87 S.Ct. 1423, 18 L.Ed.2d 581 (1967), reversing a court of appeals for entering JMOL, "We do not share the Court of Appeals' confidence as to the meaning [of the jury verdict] in light of the trial court's instructions. . . ." *Id.* at 87, 87 S.Ct. 1423. Nothing in the jury instructions here required that the jury necessarily base its verdict on the majority's proposed factual findings. The district court quite properly did not

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instruct that the theory of plaintiff's case required these two findings. The jury was instructed that in determining whether Jones used excessive force it could consider whether Jennings posed a threat to the safety of others; whether the threat was immediate and serious; whether Jennings was disrupting the search of the smoke shop; whether Jennings was actively resisting arrest; the degree of force used; the seriousness of the offense for which Jennings was being arrested; and whether the degree of force was proportional to what was appropriate under the circumstances. *Iacurci* cannot be written off as idiosyncratic, nor is it easily distinguishable.

Further, the facts themselves provide alternatives, and it is far from obvious on what subsidiary facts the verdict rested. The jury could have found that the seriousness of the injury, a broken ankle, was not justified by the charges Jennings was arrested on – disorderly conduct. This theory was argued by plaintiff's counsel at closing, and was consistent with the jury instructions. Or the jury could have concluded that the application of force sufficient to break Jennings' ankle was itself excessive, whether or not Jennings had continued to resist, and whether or not Jones increased the amount of force. The jury could have concluded that it was unreasonable for Jones to maintain the same force once Jennings said something about his ankle. Or it could have concluded that Jones maintained the same level of force when, in its view, that level was excessive to begin with. It may also be, as the district court noted, that the jury concluded that Jones "continued to twist Jennings' ankle *after* Jennings had stopped resisting." *Jennings,* 2005 WL 2043945, at *6. That is not a conclusion that Jones "increased" the pressure, and again shows that the jury did not necessarily find the facts as the majority assumes.

There is another reason not to conclude that the verdict against Jones necessarily entailed the majority's two factual findings. At the start of trial, there were seven individual defendants. There were also three plaintiffs, including Jennings' mother. These plaintiffs asserted twenty-one different claims. On the six claims that went to the jury, the jury ruled against

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record, there is considerable ambiguity and no certainty about what underlying factual conclusions motivated the *general* verdict.

This is an important issue. It is true that where the question is whether there is sufficient evidence to support a jury verdict (the usual question on a motion for JMOL), the appellate court will take all facts in favor of the verdict. But there is no attack on the sufficiency of the jury verdict, as to at least the second and third prongs of the immunity analysis. The attack is on the trial judge's separate conclusion, a determination assigned to the judge and not the jury, that Jones is entitled to immunity. This raises the question of how the judge, in evaluating immunity, is required to treat a general jury verdict, and that is precisely the type of black hole in the law we discussed in *Ringuette,* 146 F.3d at 6, and in *Kelley,* 288 F.3d at 7 n. 2.

Further, as a matter of logic, it does not necessarily follow from a rule that a *general verdict* will be upheld by taking facts in favor of the verdict when a number of theories could support the verdict, that the jury has found a particular combination of facts, or that the judge, on the immunity issue, must deem the jury to have found particular facts. Indeed, the majority acknowledges that the trial judge here thought the jury verdict was based on a different theory and

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plaintiffs on all claims except for the excessive force claim against Jones. Jurors sometimes reach compromise verdicts.

facts other than the two facts the majority now insists were found.

These are important issues on which it would be helpful to have guidance from the Supreme Court. But ultimately this case need not resolve those issues because I believe the majority is wrong, even within its own set of assumptions. Even if we assume, arguendo,[28] that the rule that facts must be taken in support of the verdict permits the majority to assume its two facts, the district court's finding of qualified immunity must nonetheless stand. I will assume arguendo that Jennings met the first prong. Even so, the officer is nonetheless entitled to immunity on the next two prongs.[29]

B. *Second Prong: Clearly Established Law*

Officer Jones was undisputably acting within the scope of his authority and his discretion. The burden then is on plaintiff to demonstrate the existence of clearly established constitutional law which the

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[28] In my view, the majority's focus on its two facts as necessary findings does not represent "the jury's discernible resolution of factual issues," *Iacobucci,* 193 F.3d at 23, but for these purposes I will assume *Iacobucci* is satisfied.

[29] The district court held, on the first prong, that the jury verdict that there had been excessive force was not supported by any evidence that no objectively reasonable officer would have applied the ankle turn control technique as Jones did. *Jennings,* 2005 WL 2043945, at *7. It is not necessary to discuss this finding.

officer is said to have violated. *Davis,* 468 U.S. at 197, 104 S.Ct. 3012; *Horta v. Sullivan,* 4 F.3d 2, 13 (1st Cir.1993).

The second prong of the qualified immunity test asks whether the constitutional right in question was "'clearly established at the time of the alleged violation' such that a reasonable officer would 'be on notice that [his] conduct [was] unlawful.'" *Riverdale Mills Corp. v. Pimpare,* 392 F.3d 55, 61 (1st Cir.2004) (alterations in original) (quoting *Suboh v. Dist. Attorney's Office,* 298 F.3d 81, 90 (1st Cir.2002)); *see also Saucier,* 533 U.S. at 202, 121 S.Ct. 2151. This inquiry is a specific one, in which it is necessary to consider the particular circumstances faced by the officer. *See Saucier,* 533 U.S. at 201, 121 S.Ct. 2151 ("This inquiry [under the second prong] . . . must be undertaken in light of the specific context of the case, not as a broad general proposition."); *see also Brosseau v. Haugen,* 543 U.S. 194, 199-200, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004); *Suboh,* 298 F.3d at 90. Although the facts of prior cases need not be "exactly on all fours with the facts of this case" in order to conclude that a right was clearly established, *Suboh,* 298 F.3d at 94, "the prior case law must give the officer reasonable notice that the specific conduct [he] is alleged to have committed in this litigation is unlawful," *Riverdale Mills,* 392 F.3d at 66. Again, the burden is on the plaintiff to make this showing, and the district court correctly held that plaintiff had failed.

In the end, the majority's holding that the law was so clearly established as to put the officer on

clear notice that his overall use of force, even increasing force, when the detainee had stopped struggling (regardless of other circumstances) was unconstitutional rests on two propositions. The first is that clear notice is established by a single case from the Eleventh Circuit which is said to be so close to this case as to have put Jones on appropriate notice. The second is that there is no need for particularized notice because notice of general principles is enough. Indeed, the majority goes so far as to reason that it should have been perfectly obvious to Jones that his use of force was excessive, despite the fact that the only expert testimony was directly to the contrary and the district court, which heard the case, concluded otherwise. The jury verdict made no conclusion on this issue, nor could it have.

1. *Lack of Prior Case Law*

There is no First Circuit case which gave Jones appropriate notice, nor is there a clear consensus of other persuasive authority giving such notice.

To start, a single opinion from another circuit is not, as a matter of law, sufficient to meet the plaintiff's burden of showing the law is clearly established. In *Wilson v. Layne,* 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999), the Supreme Court concluded that the law on a particular issue was not clearly established, and stated:

> [Plaintiffs] have not brought to our attention any cases of *controlling authority* in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a *consensus* of cases of *persuasive authority* such that a reasonable officer could not have believed that his actions were lawful.

Id. at 617, 119 S.Ct. 1692 (emphases added). *Wilson* rejected reliance on one case as sufficient. *Id.* at 616-17, 119 S.Ct. 1692. The case there, parenthetically, was a summary judgment case, *id.* at 608, 119 S.Ct. 1692, like *Smith v. Mattox,* 127 F.3d 1416 (11th Cir.1997), on which the majority relies.

In *Brady v. Dill,* 187 F.3d 104 (1st Cir.1999), we expressly adopted *Wilson*'s holding in concluding that the law was not clearly established at the time of the defendants' conduct. *Id.* at 116. We also applied the *Wilson* rule without dispute in *Savard v. Rhode Island,* 338 F.3d 23, 28 (1st Cir.2003) (equally divided en banc court). The majority thus cannot rely on the single decision of *Smith v. Mattox* to give fair notice.

Further, *Smith* does not provide such fair notice to the officer, but supports the view that immunity was correctly granted. *Smith* merely affirmed the district court's *denial of summary judgment* on qualified immunity grounds because inferences, just barely, could be drawn that the force used was obviously and patently excessive. *Id.* at 1419. In *Smith,* the plaintiff had earlier threatened the officer with a baseball bat, but had then dropped the bat, run

through a backyard, down a driveway, and into another street, and then returned to the driveway of his mother's house, where the officer found him. Smith said he then docilely submitted to arrest, got down on the ground as requested, and offered no resistance. Nonetheless, the officer struck him a blow which broke his arm in multiple places. *Id.* at 1418. Notably, *Smith* held that other inferences would permit a finder of fact to conclude that the officer had behaved reasonably. That was because

> even if Smith was not actively resisting arrest at the very moment the force was applied, he was before that moment; [the officer] could reasonably have believed that without some force restraining Smith, he would have resumed either his attacks or his flight. Thus, it was not unreasonable for [the officer] to think that he was entitled to use some force to put Smith into cuffing posture.

Id. Smith does not help Jennings; it helps Jones. The majority also argues that Jones offered no contrary precedent to *Smith.* That is not true, and the majority confuses who has the burden to show clear notice.

Other court of appeals cases, in addition to *Smith,* tend to support the constitutionality of Jones' actions and so undercut plaintiff's claims that Jones was on clear notice from prior case law that his particular application of force was unreasonable. Many of these cases involve situations, as here, where officers were attempting to handcuff an individual who had been resistant. *See Rodriguez v. Farrell,* 294

F.3d 1276, 1278-79 (11th Cir.2002) (finding no excessive force, and noting that an officer need not credit an arrestee's claims of pain, especially when the arrestee is in the process of being handcuffed); *Jackson v. City of Bremerton,* 268 F.3d 646, 650-53 (9th Cir.2001) (finding no excessive force where plaintiff suffered a fractured finger after officer pushed plaintiff to the ground for purpose of handcuffing her despite being told of preexisting back and shoulder injuries, and where plaintiff had earlier posed a threat to officers' safety and ability to control a crowd); *Huang v. Harris County,* No. 00-20806, 2001 WL 822534, at *10 (5th Cir. June 22, 2001) (holding that force was reasonable where officer broke resisting arrestee's thumb by twisting her wrist, in an effort to "prevent her from kicking him . . . and place her in handcuffs"); *Brownell v. Figel,* 950 F.2d 1285, 1288, 1293 (7th Cir.1991) (finding no constitutional deprivation where officers employed two different pain techniques, application of pressure on the plaintiff's knuckles and on a nerve behind his jaw); *Eberle v. City of Anaheim,* 901 F.2d 814, 820 (9th Cir.1990) (upholding the use of a "finger control hold" to remove a belligerent spectator from a sports arena). Under these cases, an officer in Jones' position could reasonably have concluded that his conduct was not unconstitutional.

2. *Need for Particularity and Obviousness*

For a variety of Fourth Amendment claims involving reasonableness and judgment calls, this

circuit has required that plaintiff refer to particularized prior cases with similar facts. *E.g., Buchanan v. Maine,* 469 F.3d 158, 168-69 (1st Cir.2006); *Riverdale Mills,* 392 F.3d at 65-66; *Napier v. Town of Windham,* 187 F.3d 177, 189 (1st Cir.1999). That is because the Fourth Amendment's touchstone of reasonableness generally requires careful consideration of the totality of the circumstances. "[F]or the most part per se rules are inappropriate in the Fourth Amendment context," and consideration of the "totality of the circumstances" is required. *United States v. Drayton,* 536 U.S. 194, 201, 207, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002).[30]

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[30] Other circuits have taken a similar approach to particularity in the context of Fourth Amendment reasonableness inquiries, especially in excessive force cases. *See Walker v. City of Orem,* 451 F.3d 1139, 1151 (10th Cir.2006) (noting in a Fourth Amendment unreasonable detention case that "allegations of constitutional violations that require courts to balance competing interests may make it more difficult to find the law 'clearly established' when assessing claims of qualified immunity" (quoting *Medina v. City & County of Denver,* 960 F.2d 1493, 1498 (10th Cir.1992)) (internal quotation marks omitted)); *Williams v. Kaufman County,* 352 F.3d 994, 1012 (5th Cir.2003) (holding that prolonged detention was unlawful, but affirming qualified immunity because applicable Supreme Court law, which "allow[ed] a seizure without probable cause when the proper balance [was] struck between law enforcement and personal security interests," failed to put officer on notice); *Priester v. City of Riviera Beach,* 208 F.3d 919, 926 (11th Cir.2000) ("In the context of . . . excessive force claims, we have noted that generally no bright line exists . . . ; we have therefore concluded that unless a controlling and materially similar case declares the

(Continued on following page)

In excessive force cases, our rule is that there is an even greater emphasis on the requirement of particularity, where officers act under pressure and must make very quick judgments. *See Wilson,* 526 U.S. at 615, 119 S.Ct. 1692 ("[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established."); *Priester v. City of Riviera Beach,* 208 F.3d 919, 926 (11th Cir.2000) (observing that "generally no bright line exists for identifying when force is excessive").[31] The test for excessive force "does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances." *Saucier,* 533 U.S. at 205, 121 S.Ct. 2151. "[T]he Supreme Court has cautioned that in many cases the generalized holdings of [*Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985),] and [*Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989),] will not provide sufficient notice to police

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official's conduct unconstitutional, a defendant is usually entitled to qualified immunity.").

[31] As one commentator has noted in light of the chaotic circumstances surrounding most excessive force claims, while "there may be cases . . . where the law was so clearly settled that the finding of a constitutional violation would mean that the defendant loses on qualified immunity as well[, such cases] will be relatively rare in the Fourth Amendment . . . excessive force setting because of the very fact-specific nature of these issues." 2 S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*§ 8:19.50, at 103 (4th ed.2006).

officers" as to what constitutes excessive force. *Whitfield v. Meléndez-Rivera,* 431 F.3d 1, 8 (1st Cir.2005). As reasoned above, Jennings has not provided any such particularized prior case.

There is an exception to the need for particularized prior law where the police conduct is so excessive and lies so obviously at the core of what the Fourth Amendment prohibits that the unlawfulness of the conduct would have been readily apparent to an officer. *See United States v. Lanier,* 520 U.S. 259, 270-71, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997); *Brady,* 187 F.3d at 116. The majority tries to fit within this exception. It reasons that it was so obvious that the use of force was excessive that Jones was clearly on notice for purposes of the second prong. The majority attempts to justify its obviousness conclusion by saying there is a clear and obvious dividing line between use of force and increased use of force. It cites no cases for that point, and the case law, described earlier, goes the other way. The majority's conclusion is not supported by the facts or by the case law.

As the district court pointed out, there are no cases holding that the use of the ankle turn control technique, which itself involves the use of varying degrees of force, is unconstitutional. *Jennings,* 2005 WL 2043945, at *9. Indeed, the use of pain, even when an individual complains of pain, is an established technique to bring an arrestee under control and to prevent possible injury to an officer. Case law has clearly established that the use of similar

application-of-pressure techniques, even those involving increasing amounts of pain, does not amount to excessive force. There certainly are cases in which an officer's use of force is so obviously excessive that the officer is on clear notice; this is not one of them.

C. *Third Prong: Whether an Objectively Reasonable Officer Could Have Concluded that Jones' Actions Were Lawful*

The third prong of our qualified immunity test asks "whether a reasonable officer could have concluded that his actions did not violate [the] plaintiff['s] constitutional rights." *Tremblay v. McClellan,* 350 F.3d 195, 199 (1st Cir.2003). This inquiry acknowledges that "law enforcement officials will in some cases reasonably but mistakenly conclude that [their conduct] is . . . lawful." *Anderson v. Creighton,* 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). In *Saucier,* the Supreme Court explained how the third prong applies in excessive force cases:

> It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

533 U.S. at 205, 121 S.Ct. 2151.

Under the third prong, an officer who makes "a reasonable judgment call" is entitled to qualified immunity. *Buchanan,* 469 F.3d at 170. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham,* 490 U.S. at 396-97, 109 S.Ct. 1865. On these facts, an objectively reasonable officer could have believed that Jones' use of force – and its degree – was lawful.[32]

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[32] The district court reached its conclusion based on the following factual findings, which have ample support in the record.

> Jones did not know why Jennings was being arrested or whether he was armed. Nor could Jones have known, with any certainty, why Jennings failed to heed orders to show his hands. Moreover, even if Jennings had stopped actively resisting, Jones had no way of knowing whether Jennings would resume kicking or resisting if Jones released his ankle hold.
>
> In addition, . . . Jones and other troopers at the Academy were taught that the ankle control technique is appropriate to subdue an arrestee who is actively resisting; to protect against the possibility that an arrestee who previously engaged in assaultive behavior might resume that behavior and/or to induce compliance by an arrestee who is passively resisting. Furthermore, Delaney, the only expert witness who testified, indicated that Jones acted properly and in accordance with departmental policy regarding use of the ankle turn control technique.

Jennings, 2005 WL 2043945, at *11. The district court's conclusion rests on subsidiary factual findings, which are not clearly erroneous.

There are a number of reasons for this. First, this was an instance of quick judgment by an officer in a chaotic situation. The district court stated that the entire series of these events took place in a chaotic scene over the course of about one minute. The key events, from when Officer Hill got up from the floor to when Jennings shouted in pain, took place within "several seconds." Jennings has represented the time in question to last anywhere from twelve to eighteen seconds. In this short time frame, a reasonable officer easily could have made mistakes as to Jennings' degree of resistance, the degree of risk Jennings posed to the officers, and the appropriate level of force to employ.

Concern over the safety of the officers and others was entirely reasonable. Jones testified he tried to secure Jennings' ankle both for his own safety, to prevent Jennings from kicking him while he was kneeling next to Jennings, and to lessen Jennings' resistance to arrest. He was also concerned that Jennings might have a weapon because he could not see Jennings' hands. Jennings himself acknowledged that at least one of his hands was not visible for a time. There is no doubt Jennings was resisting the officers earlier in the encounter. That was shown in the videotape.

Even if Jennings had just stopped kicking and flailing, the undisputed evidence demonstrates that (1) Jennings was not totally secured at the time his ankle was broken, (2) Jennings had posed a threat to the safety of the officers and others just seconds

before, (3) the officers were having a difficult time getting the flex cuffs on Jennings, and (4) Jones' overall use of force was, in the opinion of the expert, reasonable under the circumstances.[33] Lt. Delaney, the only expert witness on use of force, testified that *until* Jennings was "totally cuffed up and secured,"[34] it was appropriate for Jones to continue using the same compliance technique as he had, and alternative compliance techniques were not acceptable. Not even Jennings asserts that he was secured in

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[33] The majority argues that Lt. Delaney's assessment of the reasonableness of Jones' actions did not keep "the relevant factual circumstances in mind" because the factors listed by Delaney to support his view "all occurred prior to the time that Jennings ceased to resist." The majority's argument is misguided. Delaney listed a number of factors he considered relevant to his opinion, including Jennings' noncompliance and assaultive behavior, but these were not the only circumstances he had in mind. The trial transcript makes clear that Delaney's opinion was based on the same videotape the majority says demonstrates that Officer Hill walked away after pulling Jennings' left arm out from under his body.

Further, the majority fails in its attempt to distinguish "use of force" from "increase in force" as a matter of evidence. The transcript is clear that the expert was asked about the reasonableness of Jones' use of force *overall,* not about the reasonableness of the use of the ankle turn control technique without an increase in force. Even if the central issue in the case is the increase in force on Jennings' ankle, Delaney's testimony directly addresses the reasonableness of Jones' overall conduct.

[34] Delaney testified specifically about the period when officers were trying to get Jennings "cuffed up and secured." He explained that flex cuffs, which are made of plastic, are more difficult to apply than metal cuffs, and that it is very hard to get them on someone who does not want to be handcuffed.

handcuffs at the time his ankle was broken. Nor did any of his witnesses. Jennings asserted only that he had stopped moving and was not resisting arrest. And Officer Hill was clear that Jennings was not in cuffs when Hill stood up. Indeed, Hill got out of the way because other officers were having trouble cuffing Jennings.

The majority says it is irrelevant that Jennings was not handcuffed; the only important consideration is that Jennings had stopped struggling. Not so. Jennings had just been subdued by Hill; Hill then got up and Jennings could, until he was cuffed, have started up again at any time. An officer could reasonably view this as a time of great risk, and even greater risk than when Hill had subdued Jennings. The majority claims that expert testimony supports its view that any increase in force once Jones stopped struggling was unreasonable. The expert said just the opposite. Delaney testified that the degree of force was a judgment call, and that resistance was one factor and risk was another. Even if Jones were wrong about the degree of risk, his judgment was not unreasonable.

Jennings' argument is that regardless of whether he was cuffed, and even if the ankle turn control technique is acceptable, Jones applied the technique with too much force. But that is precisely in the area of judgment calls which are protected by qualified immunity. The district court directly addressed the degree of force or tension which Jones applied to the ankle, concluding that

> [t]he ambiguity of the factual situation confronting Jones; the "split second" nature of the decision that he was required to make; the existence of established departmental policy permitting use of the ankle control technique under such circumstances; and the absence of any case law prohibiting its use, virtually compel the conclusion that it was objectively reasonable for Jones to believe that he acted lawfully.

Jennings, 2005 WL 2043945, at *11.

Under our case law, the district court committed no error in finding qualified immunity on the basis that this was a protected judgment call. *See Buchanan,* 469 F.3d at 170; *Cox v. Hainey,* 391 F.3d 25, 31-32 (1st Cir.2004); *Vargas-Badillo v. Diaz-Torres,* 114 F.3d 3, 7 (1st Cir.1997).

Thus, the majority errs in assuming the jury necessarily found two facts and in reinstating the jury verdict based on those ungrounded assumptions. The majority has reinstated that jury verdict. While I disagree with that, the majority correctly remands to the district court to rule, ab initio, on the motions for new trial and for remittitur.

For the reasons stated above, I respectfully dissent as to the majority's holdings.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PAULLA DOVE JENNINGS, ET AL.,
Plaintiffs

v.

C.A. 03-572-T

STEPHEN M. PARE, ET AL.

MEMORANDUM AND ORDER

ERNEST C. TORRES, Chief Judge.

Adam Jennings (Jennings), his mother, Paulla Dove Jennings, and Keith Huertas (the "Plaintiffs") are members of the Narragansett Indian Tribe (the Tribe). They brought this action against Kenneth Jones (Jones) and several other Rhode Island state troopers seeking damages for injuries allegedly sustained during a scuffle that occurred while the troopers were executing a search warrant in a "smoke shop" operated by the Tribe.

A jury returned a verdict in favor of the defendants on most of the claims but found in Jennings' favor on his claims against Jones, under § 1983, for excessive force and, under state law, for battery. The jury awarded Jennings $301,100 in compensatory damages for a broken ankle that he sustained during the scuffle.

Jones has moved for judgment as a matter of law on the ground that he is shielded from liability by the doctrine of qualified immunity. Jones also has moved

for a new trial or, alternatively, to "Alter/Amend the Judgment by granting a Remittitur."

Since this Court finds that the doctrine of qualified immunity protects Jones from liability, his motion for judgment as a matter of law is granted and the remaining motions become moot.

Background

In July 2003, the Rhode Island State Police received information that the Tribe was selling cigarettes to the general public in a smoke shop that it operated on tribal property in Charlestown, Rhode Island and that the Tribe was not collecting the tax on tobacco products imposed by Rhode Island law. Accordingly, troopers obtained a state court warrant to search the smoke shop and to seize documents and other evidence of untaxed cigarette sales.[1]

On July 14, 2003, the day on which the warrant was to be executed, a crowd consisting primarily of Tribal members, Tribal police and several reporters

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[1] The statute establishing the Tribe's title to the land on which the smoke shop was located provides: "Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708(a). However, the Tribe maintains that this provision does not authorize state police to enter onto the land for purposes of enforcing state law. *See Narragansett Indian Tribe of Rhode Island v. State of Rhode Island*, 296 F.Supp.2d 153 (D.R.I. 2003), *appeal docketed*, No. 04-1155 (1st Cir. Jan. 30, 2004).

accompanied by television cameras had gathered in the parking lot adjacent to the smoke shop, apparently anticipating the troopers' arrival. Four plainclothes detectives, Kenneth Bell, James Demers, Stacey Shepherd, and Michelle Kershaw, were assigned to enter the smoke shop posing as prospective cigarette buyers. Upon a pre-arranged signal, uniformed troopers were to appear in order to secure the parking lot and assist the detectives in the smoke shop in executing the search warrant.

The three Plaintiffs and Domingo Monroe were working in the smoke shop at the time that the detectives entered. When uniformed troopers arrived in the parking lot, the detectives ordered Jennings, his mother, Monroe and Huertas to sit behind a counter in the smoke shop. The smoke shop's video surveillance camera shows that when officers attempted to escort Jennings to a seat, he grasped the edge of the counter which he testified was simply an effort to comply with the officers' instructions to show his hands. Eventually Jennings took a seat behind the counter but he acknowledges that he continued to shout obscenities at the officers and, according to the officers, Jennings kept getting out of his seat while the search was being conducted.

A videotape taken by the state police begins by showing Bell telling Jennings: "Alright? I gave you an opportunity, you're leaving." Jennings, then, is shown being escorted across the room toward the door leading to the parking lot. By that time, several uniformed troopers were entering the smoke shop. As

Jennings neared the door, an order to handcuff him may be heard and Jennings may be heard shouting that he was "not getting arrested." The videotape shows an ensuing struggle between Jennings and the officers during which Jennings appears to kick at the officers and can be seen resisting the officers' efforts to gain control of his hands. Eventually, the officers are shown wrestling Jennings to the floor.

It is undisputed that Jones entered the smoke shop just as the struggle between Jennings and the other officers began and that, before entering, Jones saw someone inside the smoke shop attempting to force the door shut on trooper Ann Assumpico's arm that was wedged between the door and the door jamb. It also is undisputed that Jones attempted to assist the officers grappling with Jennings, by grasping and twisting Jennings' ankle utilizing what was referred to as an "ankle turn control technique" (the "technique"). The uncontradicted testimony of Lieutenant Darren Delaney, an instructor at the State Policy [sic] Training Academy (the "Academy") was that troopers at the Academy, including Jones when he attended, were taught to use that technique in order to prevent an arrestee from kicking or engaging in other assaultive behavior and/or to induce compliance by a person who is actively or passively resisting arrest.

The videotape does not clearly show what happened between the time that Jennings was wrestled to the floor and the time that his ankle was broken. It does show that, while Jones was kneeling and holding Jennings' ankle, Mrs. Jennings approached Jones

from behind and struck him on the head. The tape also records Jennings stating that surgery, recently, had been performed on his ankle, and a trooper responding, "Don't resist and you won't have to worry about it."

Jennings' version of what occurred on the floor is that he had stopped moving and did not resist the troopers' efforts to handcuff him but that Jones continued to twist his ankle despite Jennings' statement about prior surgery. While Jennings admitted that he failed to comply with repeated instructions to show his hands, he stated that he was unable to do so because his left hand was pinned under his body.

Jennings' testimony that he was not actively resisting was supported by the testimony of Daniel Piccoli who claimed to have observed the struggle through an open door from outside the smoke shop and by the testimony of Domingo Monroe who was seated on the other side of the room. Piccoli also testified that he observed Jones continuing to twist Jennings' ankle after Jennings expressed concern that his ankle was going to be broken.

Jones, Demers, Wilfred Hill and Kenneth Buonaiuto, all of whom were involved in the scuffle, testified that, while on the floor, Jennings continued to forcefully twist and turn his body and to pull his hands in toward his waistband in an effort to prevent officers from handcuffing him. Hill testified that, as Jennings was lying on the floor, he kicked at Jones in an attempt to prevent Jones from grasping his ankle

and Demers testified that Jennings continued to kick violently until after his ankle was injured and he was handcuffed. Jones also testified, without contradiction, that, after being escorted from the smoke shop, Jennings boasted that "It took ten of you to take me down."

Analysis

DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW

I. The JMOL Standard

In ruling on a defendant's motion for judgment as a matter of law made pursuant to Fed. R. Civ. P. 50(b) (a "JMOL motion"), a court must view the evidence in the light most favorable to the plaintiff and give the plaintiff the benefit of all reasonable inferences that may be drawn from that evidence. *Vazquez-Valentin v. Santiago-Diaz,* 385 F.3d 23, 29 (1st Cir. 2004). After doing so, the court should grant the motion only if the "facts and inferences reasonably drawn from those facts . . . lead to but one conclusion – that there is a total failure of evidence to prove [the] plaintiff's case." *Id.* (quotation and citation omitted).

When a JMOL motion raising the qualified immunity defense is made after trial, "'deference should be accorded the jury's discernible resolution of disputed factual issues.'" *Jarrett v. Town of Yarmouth,* 331 F.3d 140, 147 (1st Cir. 2003) (quoting *Iacobucci v. Boulter,* 193 F.3d 14, 23 (1st Cir. 1999)). However, in order to withstand a JMOL motion, the

plaintiff "must have presented more than a mere scintilla of evidence" and "is not entitled to inferences based on speculation and conjecture." *Vazquez,* 385 F.3d at 30 (quotations and citations omitted).

In this case, Jones argues that even when the evidence is viewed in the light most favorable to Jennings, the doctrine of qualified immunity entitles him to judgment as a matter of law with respect to both the § 1983 excessive force claim and the state law battery claim.

II. The § 1983 claim

A. Nature and purpose of qualified immunity

The public has a strong interest in seeing that police officers and other government officials do not abuse their authority by violating the constitutional rights of others. Section 1983 serves that interest by subjecting officials who commit such abuses to personal liability in a civil suit for damages. *See Anderson v. Creighton,* 483 U.S. 635, 638 (U.S. 1987) ("[w]hen government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.'" (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 814 (1982)).

On the other hand, the public has an equally strong interest in seeing that police officers and other government officials are not deterred from properly

performing their duties by fear that they will be exposed to potentially ruinous personal liability for every judgment they are required to make which, later, may be deemed erroneous. *Id.* (the public has an interest in seeing that fear of liability does not "unduly inhibit officials in the discharge of their duties.").

The doctrine of qualified immunity seeks to reconcile these competing interests by protecting police officers from "the chilling threat of liability" for difficult decisions that they must make in carrying out their responsibilities as long as their conduct is "objectively reasonable." *Swain v. Spinney,* 117 F.3d 1, 10 (1st Cir. 1997). In essence, qualified immunity provides "'a fairly wide zone of protection'" in to officers in "'close cases.'" *Id.* (quoting *Roy v. Inhabitants of the City of Lewiston,* 42 F.3d 691, 695 (1st Cir. 1994)).

For qualified immunity purposes an officer's conduct may be "objectively reasonable," even if it is determined to be erroneous, because the doctrine "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant,* 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs,* 475 U.S. 335, 343, 341 (1986)). In each case, the relevant inquiry is whether "'a reasonable officer could have believed [that what the officer did was] lawful, in light of clearly established law and the information the [officer] possessed'" at the time he acted. *Id.* at 227 (quoting *Anderson,* 483 U.S. at 641).

B. The analytical framework

The Supreme Court has described qualified immunity analysis as a two step process. *Saucier v. Katz,* 533 U.S. 194, 201 (2001); *see Brosseau v. Haugen*, 125 S.Ct. 596, 601 (2004) (Breyer, J., concurring). First, it must be determined whether "the facts alleged show the officer's conduct violated a constitutional right." *Saucier,* 533 U.S. at 201. If so, a determination must be made as to whether that right was "clearly established" so that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

The First Circuit subdivides the second step into two separate inquiries, namely: "'whether the right was clearly established at the time of the alleged violation' such that a reasonable officer would 'be on notice that [his] conduct [was] unlawful'" and whether a "'reasonable officer, similarly situated, would understand that the challenged conduct violated' the clearly established right at issue." *Riverdale Mills Corp. v. Pimpare,* 392 F.3d 55, 61 (1st Cir. 2004) (quoting *Suboh v. Dist. Attorney's Office of Suffolk Dist.,* 298 F.3d 81, 90 (1st Cir. 2002)).

Under either approach, the first step, in excessive force cases, focuses on whether the force used exceeded constitutionally permissible boundaries and the second step focuses on whether a reasonable officer, nevertheless, could have believed that the force used was lawful under the circumstances. *See*

Saucier, 533 U.S. at 201-202; *see also Riverdale,* 392 F.3d at 61, 65.

Because the applicability of qualified immunity ordinarily turns on whether the specific right allegedly violated was clearly established and whether it was objectively reasonable for the officer to have believed the he was acting lawfully, the assertion of qualified immunity, generally, presents a question of law to be decided by the Court rather than a question of fact to be decided by a jury. *See Mitchell v. Forsyth,* 472 U.S. 511, 528 (1985); *see also Acevedo-Garcia v. Monroig,* 351 F.3d 547, 563 (1st Cir. 2003). Indeed, since the immunity conferred is "an *immunity from suit* rather than a mere defense to liability," the question, usually, should be decided before trial because the full measure of protection would be "effectively lost if a case is erroneously permitted to go to trial." *Forsyth,* 472 U.S. at 526 (emphasis in original); *see Hunter,* 502 U.S. at 537 ("Immunity ordinarily should be decided by the court long before trial."); *Swain,* 117 F.3d at 10 ("[T]he immunity question should be resolved, where possible, in advance of trial.").

An exception to the general rule is made when the qualified immunity decision turns on genuinely disputed questions of material fact. In those cases, the disputed facts, first, must be decided by the jury. *See Swain,* 117 F.3d at 10 (qualified immunity could not be determined at summary judgment stage where material facts regarding circumstances of alleged unreasonable search were significantly in dispute).

Whether a fact is material in determining whether qualified immunity applies depends upon the circumstances of each case. In "excessive force" cases, it is not enough that a disputed fact is material with respect to whether the force used was "excessive," because, as previously stated, qualified immunity affords protection for "'mistaken judgments.'" *Hunter,* 502 U.S. at 229 (quoting *Malley,* 475 U.S. at 343). Consequently, in order to create a jury question, the disputed fact also must be material to the question of whether a reasonable officer could have believed that the force used was lawful. As the Supreme Court has said: "a material issue of fact . . . on the excessive force claim" does not require submitting the case to a jury "[i]f the law did not put the officer on notice that his conduct would be clearly unlawful." *Saucier,* 533 U.S. at 202.

In this case, the qualified immunity question was not decided before trial because it was not pressed until after the plaintiffs rested their case.[2] Furthermore, at the close of the evidence, this Court denied Jones' JMOL motion and submitted the case to the jury for a determination as to whether Jones used excessive force. After further consideration, this Court is convinced that it erred in denying Jones' JMOL motion which placed the jury in the untenable position of deciding the case by considering only

[2] The state explains the delay on the ground that Jones was not named as a defendant until after the deadline for filing motions.

whether the force used was excessive and doing so without evidence sufficient to establish the standard to be used as a benchmark in making that determination.

The reasons for reaching that conclusion are more fully explained below but may be summarized as follows. First, Jennings failed to present any evidence that Jones' actions deviated from the standard of conduct that should have been expected from an objectively reasonable police officer under the circumstances. Second, even if Jones' use of the "ankle turn control technique" is viewed as amounting to excessive force it did not violate any "clearly established" constitutional prohibition. Finally, the undisputed evidence demonstrates that it was "objectively reasonable" for Jones to believe that he was acting lawfully.

C. Step One – The alleged constitutional violation

In this case, the constitutional right allegedly violated was Jennings' 4th Amendment right to be free from "unreasonable seizures." More specifically, Jennings claims that Jones' use of the ankle turn control technique constituted excessive force.

It is well established that a police officer's use of excessive force in making an arrest falls within the 4th Amendment's prohibition against "unreasonable seizures." *See Graham v. Connor,* 490 U.S. 386, 394 (1989); *Jarrett,* 331 F.3d at 148. However, it is equally

well established that, where appropriate, a police officer making an arrest has "'the right to use some degree of physical coercion or threat thereof to effect it.'" *Saucier,* 533 U.S. at 208 (quoting *Graham,* 490 U.S. at 396)); *see also Lee v. Ferraro,* 284 F.3d 1188, 1200 (11th Cir. 2002) ("[T]he use of force is an expected, necessary part of a law enforcement officer's task of subduing and securing individuals suspected of committing crimes.").

The distinction between excessive force and permissible force turns on whether the level of force used was reasonable and the test is whether, under the circumstances confronting the defendant at the time that he acted, "no objectively reasonable officer would have used" the same degree of force. *Isom v. Town of Warren,* 360 F.3d 7, 12 (1st Cir. 2004); *see Napier v. Town of Wyndham,* 187 F.3d 177, 183 (1st Cir. 1999) ("'[T]he relevant inquiry [in excessive force cases] is whether no reasonable officer could have made the same choice under the circumstances.'" (internal quotation omitted)).

A plaintiff who alleges that excessive force was used bears the burden of proving it. *Isom,* 360 F.3d at 10 (In order to prevail on an excessive force claim, the plaintiff must establish that the force used was "objectively unreasonable under the circumstances."). Moreover, in determining whether that burden has been met, it should be recognized that police officers often are required to make "split second judgments – in circumstances that are tense, uncertain, and rapidly evolving," and that their conduct "must be

judged from the perspective of a reasonable officer on the scene," and not in the calm atmosphere of the courtroom "with the 20/20 vision of hindsight." *Graham,* 490 U.S. at 396-97.

Since the use of even reasonable force creates an inherent risk of injury, the mere fact that an arrestee is injured does not establish that the force used was excessive.[3] As one court has noted, "the *typical* arrest involves some force and injury, and the use of force is an expected, necessary part of a law enforcement officer's task of subduing and securing individuals suspected of committing crimes." *Ferraro,* 284 F.3d at 1200 (internal quotation and citation omitted) (emphasis in original).

In this case, the jury determined that Jones' use of the ankle turn control technique amounted to excessive force. Since it is clear that, at least initially, Jennings actively resisted arrest, the jury's determination, apparently, was based on a finding that Jones continued to twist Jennings' ankle *after* Jennings had stopped resisting and was under control. This Court respectfully disagrees with that finding because, in my view, the troopers' testimony that Jennings continued to kick at them and to actively resist their

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[3] In this regard, it should be noted that, on the day following the trial, a local newspaper quoted one of the jurors as saying "I don't think it was anything intentional. The bottom line is that it was done. Somebody got hurt." Katie Mulvaney, Jury Finds Against Trooper, Prov. Journ., March 29, 2005, at A1.

efforts to pull his hands away from his waistband was much more credible than the contrary testimony of Jennings, Piccoli and Monroe.

Unlike the troopers who were directly involved in the struggle, it does not appear that either Piccoli or Monroe was in a good position to have observed what took place on the floor. Monroe was seated on the opposite side of the room and the videotape shows Bell standing between Monroe and where the struggle occurred. The videotape also show that, shortly before the struggle between Jennings and the troopers ended, Piccoli was in the middle of the parking lot, a considerable distance from the doorway to the smoke shop. Furthermore, Piccoli previously had testified before a commission investigating the smoke shop raid that the incident in question occurred *outside* the smoke shop.

It, also, is difficult to accept Jennings' testimony that, while on the floor, he did not resist the troopers' efforts to handcuff him. That testimony is inconsistent with Jennings' conduct before he was wrestled to the floor when the videotape records him exclaiming that he was "not getting arrested" and clearly shows him actively scuffling with the troopers. In addition, Jennings' testimony that he was not resisting seems inconsistent with the fact that the videotape shows that officers continued to be engaged with Jennings until his ankle was broken and the fact that, on the videotape, officers may be heard responding to Jennings' complaint that they were hurting his ankle by telling him that he should stop resisting. Jennings'

testimony, that he ceased resisting, also appears inconsistent with his subsequent boast that it took 10 troopers to take him down.

Even if Jennings had stopped actively resisting when his ankle was broken, the reasonableness of Jones' continued application of the ankle turn control technique must be judged in light of Jennings' earlier conduct and the facts available to Jones at the time that he acted. Having just entered the smoke shop, Jones had no way of knowing why Jennings was being arrested or whether he was armed. Consequently, Jennings' failure to show his hands was a legitimate cause for concern and, coupled with the fact that Jones had no way of knowing whether Jennings might resume kicking, a good reason for maintaining the ankle hold until Jennings was handcuffed and fully under control, which clearly did not occur until after Jennings' ankle was broken.[4] Indeed, Delaney, who Jennings adopted as his own expert witness, testified that, under the circumstances, Jones acted reasonably in maintaining the ankle hold because releasing it would have left Jones vulnerable to injury.

Nevertheless, this Court's disagreement with the jury's finding that Jones used excessive force is not a ground for granting Jones' JMOL motion. Unlike a

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[4] Jones also had no way of knowing whether Jennings' statement that surgery had recently been performed on his ankle was true or merely a ruse to get Jones to release his hold.

motion for a new trial, a JMOL motion does not permit a court to make its own assessment regarding the credibility of witnesses or the weight of the evidence. *Vazquez,* 385 F.3d at 29. The jury's finding must be accepted unless "there is a total failure of evidence" to support it. *Id.*; *see* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure,* § 2524 (2nd ed. 1987).

In this case, Jennings failed to present any evidence that, under the circumstances confronting Jones, "no objectively reasonable officer" would have applied the ankle turn control technique in the manner that Jones did. Put another way, Jones' actions must be judged in accordance with the standard of conduct expected of an "objectively reasonable officer" under the circumstances, and it was incumbent on Jennings to establish that Jones' actions deviated from that standard. Here, the only evidence with respect to what a reasonable officer would have done under the circumstances was Delaney's testimony that Jones acted properly in continuing to apply the ankle turn control technique until Jones was fully under control and in custody and that Jones' use of force was reasonable under the circumstances. Although Delaney did acknowledge that the continuum of force was a "two way street," meaning that, if the level of resistance changes, the level of force used should be adjusted upward or downward to correspond to what is appropriate at the level of resistance, he also made it clear that use of the ankle turn control technique is appropriate to overcome either

active or passive resistance by an arrestee. More specifically, Delaney testified that it would have been appropriate for Jones to maintain the ankle turn control technique even if Jennings was not kicking and the officers were "just trying to get the flex cuffs on him."

In short, there was an absence of any evidence that "no objectively reasonable officer" would have used the level of force used by Jones and, therefore, the jury unfairly was put in the untenable position of trying to decide that question without sufficient evidence of the applicable standard for measuring the lawfulness of Jones' conduct. In that respect, this case is markedly similar to *Isom* where the First Circuit upheld the entry of judgment as a matter of law in favor of a police officer sued for "excessive force" for using pepper spray because:

> No expert testified that, under the circumstances faced by Detective Clancy, no reasonable officer would have used pepper spray; in fact, the plaintiffs did not produce any expert testimony at all. Nor did the plaintiff produce any written policy or text stating that the use of pepper spray in circumstances such as those faced by Clancy was not reasonable.

Isom, 360 F.3d at 12.

Isom also rejected the argument that such evidence was unnecessary and that the issue of excessive force "should have been left to the jury's common

sense." *Isom,* 360 F.3d at 12. In doing so, the court stated that: "[f]or the jurors to have been given an opportunity to exercise their common sense on the ultimate question of whether no objectively reasonable officer would have used pepper spray, there must have been some basis in the evidence on which to ground that determination." *Id.*

D. Whether the Right was a Clearly Established Right

Even assuming, *arguendo,* that Jennings presented sufficient evidence to support a finding of excessive force, that finding would bear only on the first step of qualified immunity analysis. The analysis does not end there because "[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau,* 125 S.Ct. at 599. Accordingly, at the second step of qualified immunity analysis inquiry must be made into whether, under the circumstances, no "objectively reasonable officer" could have believed that the force used was lawful. *See Brosseau,* 125 S.Ct. at 599; *Saucier,* 533 U.S. at 205. Put another way, the issue becomes "whether the officer had fair notice that her conduct was unlawful." *Brosseau,* 125 S.Ct. at 599.

In addressing that issue, the threshold question is whether the right allegedly violated was "clearly established" at the time the officer acted. *Brosseau,*

125 S.Ct. at 599. That determination must be made "against the backdrop of the law at the time of the conduct." *Id.* In order for a right to be "clearly established," "'[t]he contours of the right must be sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right.'" *Id.* (quoting *Saucier,* 533 U.S. at 202 (internal quotation omitted)).

In this case, the right at issue is Jennings' 4th Amendment right to be free from unreasonable seizures. However, the Supreme Court has cautioned that, because determining whether a right is clearly established "serves to advance understanding of the law," the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier,* 533 U.S. at 201. If the inquiry is made at an overly general level by defining the right too broadly, it would "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson,* 483 U.S. at 639. Thus, "[i]t does no good to allege [at the first step] that police officers violated the right to free speech and then [at the second step] conclude that the right to free speech has been clearly established in this country since 1791." *Riverdale,* 392 F.3d at 62 (quoting *Int'l Action Ctr. v. United States,* 365 F.3d 20, 25 (D.C. Cir. 2004)).

Whether a right, defined at the appropriate level of specificity, was "clearly established," ordinarily, is a question of law that must be decided by the court

rather than the jury. *See Suboh,* 298 F.3d at 90 (both the second and third steps of qualified immunity analysis are questions of law). The "core concern" is whether "[p]rior case law [gave] the officer reasonable notice that the specific conduct [he] is alleged to have committed in this litigation is unlawful." *Riverdale,* 392 F.3d at 65-66.

In an excessive force case, unless it is obvious that the force used was excessive, the Court must look to prior case law to determine whether it was clearly established that the Constitution prohibited the type of conduct in which the officer engaged under the specific circumstances confronting the officer. *See Brosseau,* 125 S.Ct. at 599.

Here, it is not obvious that Jones used excessive force. At worst, this is one of those "'close cases,'" *Swain,* 117 F.3d at 10 (quoting *Roy,* 42 F.3d at 695), in which there is a "'hazy border between excessive and acceptable force,'" *Saucier,* 533 U.S. at 206 (quoting *Priester v. Rivera Beach,* 208 F.3d 919, 926-27 (11th Cir. 2000)). Therefore, in order to determine whether Jones' use of the ankle turn control technique violated a clearly established constitutional right, the Court must look to prior case law.

Jennings is unable to cite any case, decided either before or after July 14, 2003, that holds use of the ankle turn control technique, or any similar technique, in arresting an uncooperative subject to be unconstitutional. In fact, the few cases in which similar pain control or compliance techniques were

used to arrest uncooperative subjects indicate that the use of such techniques does not amount to excessive force. *See Forrester v. City of San Diego,* 25 F.3d 805, 807 (9th Cir. 1994) (affirming jury verdict that "physical pressure administered on [anti abortion] demonstrators' limbs in increasing degrees, resulting in pain" did not violate Fourth Amendment where demonstrators "'passively resisted'" arrest by remaining seated, refusing to move, and going limp when officers attempted to escort them to police van); *see also, Brownell v. Figel,* 950 F.2d 1285, 1289, 1293 (7th Cir. 1991) (applying pressure to nerve behind jaw bone in order to induce individual being arrested for drunken driving to stand up was not excessive force even though it may have aggravated a spinal injury).

In *Forrester,* the court found it significant that officers "did not threaten or use deadly force and did not deliver physical blows or cuts." 25 F.3d at 807. In rejecting the argument that dragging and carrying would have been a "more" reasonable method of taking demonstrators into custody the *Forrester* court said:

> [p]olice officers . . . are not required to use the least intrusive degree of force possible. Rather, . . . the inquiry is whether the force that was used to effect a particular seizure was reasonable, viewing the facts from the perspective of a reasonable officer on the scene. [citation omitted]. Whether officers hypothetically could have used less painful, less injurious, or more effective force in executing an arrest is simply not the issue.

Forrester, 25 F.3d at 807-808. Indeed, after the fact speculation about "more" reasonable actions that an officer might have taken invites the very type of hair splitting and Monday morning quarterbacking that qualified immunity seeks to protect against.

Here, on July 14, 2003, there was no "clearly established" law that would have put Jones on notice of any constitutional prohibition against use of the ankle turn control technique under the circumstances confronting him.

E. Whether the Alleged Violation was Apparent to an Objectively Reasonable Officer

The doctrine of qualified immunity also recognizes that, even in cases where the law is clear regarding the type of conduct that is or is not lawful under particular circumstances, an officer reasonably may misapprehend the circumstances confronting him because the "factual situation [confronting the officer] might be ambiguous or the application of the legal standard to the precise facts at issue might be difficult." *Riverdale,* 392 F.3d at 61. Consequently, in such cases, "the officer's actions may be objectively reasonable and she may be entitled to qualified immunity" even if the right allegedly violated was clearly established. *Id.*

For example, in an excessive force case "[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, . . . the officer would

be justified in using more force than in fact was needed." *Saucier,* 533 U.S. at 205. Similarly, "[a]n officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances." *Id.* In either event, as long as "the officer's mistake as to what the law requires is reasonable . . . the officer is entitled to the immunity defense." *Id.*

Although a "reasonable officer" standard is utilized both at step one to determine whether the force used was excessive and at step two to determine whether the officer reasonably could have believed that it was lawful, the Supreme Court has held that the two inquiries are separate and distinct. In *Saucier,* the Supreme Court made it clear that the step one inquiry focuses on whether the force used, in fact, was reasonable; whereas, the step two inquiry focuses on whether the officer reasonably, albeit mistakenly, could have believed that the force used was lawful. Specifically, *Saucier* expressly rejected the argument that a finding of excessive force precludes a finding that the officer reasonably could have believed that the force used was permissible. *See Saucier,* 573 U.S. at 204-206.

Here, the evidence clearly demonstrates that, even if he was mistaken, Jones reasonably could have believed that his utilization of the ankle turn control technique was lawful. As already noted, Jones did not know why Jennings was being arrested or whether he was armed. Nor could Jones have known, with any

certainty, why Jennings failed to heed orders to show his hands. Moreover, even if Jennings had stopped actively resisting, Jones had no way of knowing whether Jennings would resume kicking or resisting if Jones released his ankle hold.

In addition, as previously stated, Jones and other troopers at the Academy were taught that the ankle control technique is appropriate to subdue an arrestee who is actively resisting; to protect against the possibility that an arrestee who previously engaged in assaultive behavior might resume that behavior and/or to induce compliance by an arrestee who is passively resisting.

Furthermore, Delaney, the only expert witness who testified, indicated that Jones acted properly and in accordance with departmental policy regarding use of the ankle turn control technique.

The ambiguity of the factual situation confronting Jones; the "split second" nature of the decision that he was required to make; the existence of an established departmental policy permitting use of the ankle control technique under such circumstances; and the absence of any case law prohibiting its use, virtually compel the conclusion that it was objectively reasonable for Jones to believe that he acted lawfully.

III. The battery claim

The fact that, under federal law, the doctrine of qualified immunity protects Jones from liability with

respect to the excessive force claim under § 1983 does not necessarily shield him from liability with respect to the state law battery claim. In order to decide whether Jones is entitled to judgment as a matter of law on the battery claim, this Court must look to Rhode Island law. *See Benning v. Bd. of Regents of Regency Universities,* 928 F.3d 775, 779 (7th Cir. 1991) ("[S]tate rules of immunity are binding in federal court with respect to state causes of action."); *see also Hatch v. Town of Middletown,* 311 F.3d 83, 91 (1st Cir. 2002) (applying Rhode Island law to determine whether police captain entitled to qualified immunity from state law privacy claim).

The task of ascertaining state law is relatively simple when the state's highest court has definitively ruled on the precise question at issue. However, even in the absence of such a ruling, a federal court may predict what the state's highest court would decide if the applicable principles of state law are "sufficiently clear." *See Hugel v. Milberg, Weiss, Bershad, Hynes & Lerach, LLP,* 175 F.2d 14, 18 (1st Cir. 1999) ("[w]hen state law is sufficiently clear to allow [a federal court] to predict its course, certification is both inappropriate and an unwarranted burden on the state court" (internal quotation omitted)).

While the Rhode Island Supreme Court has not yet expressly adopted the federal doctrine of qualified immunity, it strongly has suggested that it would be so inclined. The federal doctrine of qualified immunity first was alluded to in *Pontbriand v. Sundlun,* where, in recognizing that a public official might be

entitled to "*some form* of common law immunity," the court cited *Harlow* with apparent approval. 699 A.2d 856, 867 (R.I. 1997)(emphasis in original). However, *Pontbriand* did not definitively rule on the issue because the case was decided on other grounds.

Later, in *Ensey v. Culhane,* 727 A.2d 687, 690 (R.I. 1999), a suit against the State Police arising out of an allegedly false arrest, the court, again, cited *Harlow* and said that "in an appropriate case, the doctrine of qualified immunity might well be applied by this Court." *Ensey* also cited, with approval, the following passage from *Hunter*:

> Our cases establish that qualified immunity shields [law enforcement officers] from suit for damages if 'a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed.' [citation omitted]. Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity.

Ensey, 727 A.2d at 691 (quoting *Hunter,* 502 U.S. at 227 (internal citations and quotations omitted)) (inserts in original). However, once more, the court did not rule directly on the qualified immunity question because the case was decided on other grounds.

The First Circuit has described *Pontbriand* and *Ensey* as "reflect[ing] Rhode Island's recognition of a qualified immunity defense under state law analogous to the federal doctrine established by the United

States Supreme Court in *Harlow v. Fitzgerald.*" *Hatch,* 311 F.3d at 90. Accordingly, the First Circuit has concluded that applicability of the federal doctrine of qualified immunity to state law claims "is well grounded in the law of Rhode Island." *Id.*

Thus, it seems "sufficiently clear" that Rhode Island would join the ranks of other states that have applied the federal doctrine of qualified immunity to state law claims. *See, e.g., Stearns v. Vermont,* 833 A.2d 835, 840 (2003) (applying *Harlow* qualified immunity standard to state law claims in affirming summary judgment in favor of probation officer with respect to allegedly unlawful search); *Jenness v. Nickerson,* 637 A.2d 1152, 1159 (Me. 1994) (applying *Harlow* qualified immunity standard in affirming summary judgment in favor of police officers with respect to illegal search claim under state civil rights act); *Duarte v. Healy,* 537 N.E.2d 1230, 1232 (Mass. 1989) (adopting federal qualified immunity standard with respect to claims under state civil rights act); *EIC Dev., LLC v. Mystic Valley Dev. Comm'n,* 2003 WL 1702531 (Mass. Super. Ct. 2004) (applying *Harlow* qualified immunity standard in determining state law claim of intentional interference with contractual or business relations). In *Foster v. McGrail,* 844 F.Supp. 16, 29 (D.Mass. 1994), the court concluded that Massachusetts would extend the federal qualified immunity standard specifically to a state law battery claim against a correctional officer because: "Concerns about the impact of rules of liability on the performance of the duties of public officials do not

vary because liability is claimed on a theory of battery rather than on a theory of violation of civil rights."

Even states not yet adopting the federal doctrine of qualified immunity have long afforded some other form of common law or statutory immunity to police officers and/or other public officials. The precise contours of the immunity vary from state to state, but, generally, the principal difference between that immunity and federal qualified immunity is that those states utilize a subjective good faith requirement instead of or in addition to *Harlow's* requirement of objective reasonableness. *See e.g. Bailey v. Kennedy,* 349 F.3d 731, 742 (4th Cir. 2003) (no immunity under North Carolina law for acts committed with "malice or corruption" (citing *Grad v. Kaasa,* 321 S.E. 2d 888, 890 (N.C. 1984)); *Russoli v. Salisbury Twp.,* 126 F.Supp. 2d 821, 868 (E.D. Pa. 2000) (under Pennsylvania law, a police officer is not immune from an assault and battery claim if he "*knew,* that force used was not reasonable under the circumstances" (emphasis added)); *Samaniego v. City of Kodiak,* 2 P.3d 78, 84 (Alaska 2000) (holding officers immune from state law excessive force/assault claims if force was used in subjective good faith and was "objectively reasonable" under *Harlow* qualified immunity standard); *Shoemaker v. Smith,* 725 A.2d 549, 560 (Md. 1999) (actual malice or gross negligence defeats qualified immunity under Maryland law); *Mulligan v. Rioux,* 643 A.2d 1226, 1233-1234 (Conn. 1994) (no immunity under Connecticut law for acts "involv[ing]

malice, wantonness or intent to injure"); *Rico v. State,* 472 N.W.2nd 100, 107 (Minn. 1991) (no official immunity under Minnesota law for "willful or malicious wrong[s]").

In this case, even if Rhode Island engrafted a "good faith" requirement on the federal doctrine of qualified immunity, Jones would be shielded from liability because there is no evidence that would support a finding that Jones acted in bad faith.

Conclusion

This is not a case in which a police officer gratuitously used physical force under circumstances that did not justify the use of force. Nor is this a case in which a police officer acted as a self appointed judge, jury and executioner by meting out his own version of corporal punishment for some perceived violation or affront. Nor is this a case in which the use of force was warranted but the force used clearly was far in excess of permissible levels. Obviously, those kinds of conduct could not be tolerated and the doctrine of qualified immunity would not protect the officer from liability in any of those cases.

Rather, this is a case in which the plaintiff's own conduct in resisting arrest justified the use of physical force and force was applied, solely, for the purpose of subduing him. Moreover, while arguably, there may be room for disagreement regarding whether the level of force used was appropriate, this is not a case in which the force clearly was excessive. On the

contrary, it clearly was objectively reasonable for Jones, at least, to have believed that the force used was lawful. Thus, this is precisely the type of "'close case'" in which the doctrine of qualified immunity affords a "'wide zone of protection,'" *Swain,* 117 F.3d at 9 (quoting *Roy,* 42 F.3d at 695), that shields an officer from liability as long as he acts in an "objectively reasonable" manner. Accordingly, while it is very regrettable that Jennings suffered a broken ankle, Jones cannot be held liable for that injury.

For all of the foregoing reasons, Jones' Motion for Judgment as a Matter of Law on Counts VIII and XIV is hereby granted.

IT IS SO ORDERED:

/s/ Ernest C. Torres
Ernest C. Torres
Chief Judge

Date: August 24, 2005

2007 WL 2339129

United States Court of Appeals, First Circuit.

Adam JENNINGS, Plaintiff, Appellant,

v.

Kenneth JONES, Defendant, Appellee.

No. 05-2522.

Entered: Aug. 17, 2007.

Appeal from the United States District Court for the District of Rhode Island, Ernest C. Torres, U.S. District Judge.

Charles M. Bradley, FTS, Westerly, RI, for Plaintiff, Appellant.

Rebecca Tedford Partington, FTS, RI Attorney General's Office, Providence, RI, for Defendant, Appellee.

Before TORRUELLA, LYNCH and LIPEZ, Circuit Judges.

Appellee Kenneth Jones filed a petition for rehearing en banc in this case, which, under our Internal Operating Procedure X, encompasses a petition for panel rehearing. The petition for rehearing is granted. Accordingly, the panel's March 7, 2007, opinion is withdrawn and the judgment of even date vacated.

The panel majority now issues a new opinion, which eliminates the portion of the original panel opinion concluding that the defendant had abandoned his motions for a new trial and a remittitur. Instead,

the new opinion orders a remand so that the district court may address these motions. However, the portion of the decision concluding that the district court erred in vacating the jury verdict on the basis of qualified immunity remains intact. Hence, we once again order reinstatement of the jury verdict.

In conjunction with the issuance of the majority opinion this day, Judge Lynch files her dissent to the majority's decision vacating the judgment of the district court.

2007 WL 2339237

United States Court of Appeals, First Circuit.
Adam JENNINGS, Plaintiff, Appellant,
v.
Kenneth JONES, Defendant, Appellee.
No. 05-2522.

Entered: Aug. 17, 2007.

Appeal from the United States District Court for the District of Rhode Island, Ernest C. Torres, U.S. District Judge.

Charles M. Bradley, Westerly, RI, for Plaintiff, Appellant.

Rebecca Tedford Partington, RI Attorney General's Office, Providence, RI, for Defendant, Appellee.

Before *BOUDIN*, Chief Judge, *TORRUELLA*, *LYNCH*, *LIPEZ*, and *HOWARD*, Circuit Judges.

Appellee Kenneth Jones' petition for rehearing en banc is denied.

BOUDIN, Chief Judge and *LYNCH*, Circuit Judge, concurring in the denial of rehearing en banc.

Properly, the revised panel opinion withdraws its ruling that the appellant waived or forfeited his right to a ruling on his conditional new trial motion by failing to renew or argue it after the district judge granted qualified immunity. The panel opinion adheres to its decision overturning the district judge's belated grant of qualified immunity; at a minimum,

we are both doubtful as to the panel majority's reasoning and result on this issue.

Nevertheless, at this time a new trial, in which all issues can be assessed afresh, appears to us the best solution-taking account of the unfortunate uncertainty about just what the jury decided and the other demands on the en banc court. If the district court grants the motion for a new trial and sets aside the jury verdict, appellant will have an adequate opportunity to defend himself on a fresh record and with proper instructions.

TORRUELLA, Circuit Judge, and *LIPEZ*, Circuit Judge, concurring in the denial of rehearing en banc.

The majority and dissenting opinions speak for themselves. Whether or not there should be a new trial on remand, and what issues should or should not be addressed in any new trial, are entirely matters for the district court to decide in the first instance.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* * * * * * * * * * * * * * * * *

PAULLA DOVE JENNINGS, ET AL.,	*	
Plaintiffs,	*	C.A. No: 03-572T
VS.	*	MARCH 28, 2005
STATE OF RHODE ISLAND, ET AL.,	*	10:00 A.M.
Defendants.	*	PROVIDENCE, RI

* * * * * * * * * * * * * * * * *

BEFORE THE HONORABLE ERNEST C. TORRES
CHIEF DISTRICT JUDGE
(JURY TRIAL)

APPEARANCES:

FOR THE PLAINTIFFS:	Charles M. Bradley, Esquire 39 Grove Avenue Westerly, Rhode Island 02891
FOR THE DEFENDANT:	Rhode Island Attorney General's Office By: Rebecca Partington, Esquire by: Amy Vignali Coleman, Esquire 150 South Main Street Providence, RI 02903

COURT REPORTER: Angela M. Reynolds,
RPR-FCRR
One Exchange Terrace
Providence, RI 02903

* * *

[113] [THE CLERK: "]As to the claims by Adam Jennings against Kenneth Jones, Fourth Amendment claim for excessive force, the jury finds for the plaintiff, Adam Jennings. As to the battery claim, the jury finds for the plaintiff, Adam Jennings. The amount of damages, if any, equal $301,100."

* * *

United States Court of Appeals
For the First Circuit

No. 99-1498

SEAN MILETTE,

Plaintiff, Appellant,

v.

JAMES MANNI; TIKOIAN, (SURNAME); JEFFREY COLEMAN; DAVID NEWTON; STATE OF RHODE ISLAND,

Defendants, Appellees.

Before

Torruella, *Chief Judge*
Boudin and Lipez, *Circuit Judges*.

JUDGMENT

Entered: December 14, 1999

Appellees have moved for dismissal of the appeal or for summary affirmance. After a careful review of the record and of the submissions of the parties, we allow appellees' motion and summarily affirm.

In reviewing an award of summary judgment, we examine *de novo* whether a reasonable jury could find the conduct in question "so deficient that no reasonable officer could have made the same choice under

the circumstances." *Napier v. Town of Windham*, 187 F.3d 177, 182, 187 (1st Cir. 1999); *see also Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 694 (1st Cir. 1994). In this case we conclude that no rational jury could find appellee Manni's conduct so deficient. It simply expects too much of an officer faced with an arrestee who has been evasive, one who already apparently has attempted to conceal a deadly weapon from him, one who displays on his shirtless torso tattoos indicative of his apparent propensity for violence, and one who appears to be resisting arrest, to think not only about all of this but about the weather, too. Certainly a reasonable officer might fail to contemplate all of this in the mere 30 seconds (or less) it took to cuff the appellant. *See Napier*, 187 F.3d at 188 (court must judge the officer's behavior "from the perspective of a reasonable officer on the scene, rather then with the 20/20 vision of hindsight"). Manni's actions, "even if mistaken, were not unconstitutional." *Roy*, 42 F.3d at 696.

Appellant waived his right to appeal the judgment as to appellees Tikoian and Coleman. *United States v. Mitchell*, 85 F.3d 800, 803 (1st Cir. 1996).

Judgment affirmed. 1st Cir. Loc. R. 27(c).

By the Court:

PHOEBE D. MORSE, Clerk

By: /s/ JANICE M. O'NEIL
Chief Deputy Clerk

(4)

No. 07-654

Supreme Court, U.S.
FILED
DEC 19 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

KENNETH JONES,

Petitioner,

v.

ADAM JENNINGS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

MICHAEL BRADLEY
39 Grove Avenue
Westerly, RI 02891
Tel 401-596-0808
Fax 401-596-1327

Counsel for Respondent, Adam Jennings

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Amendment is violated when a police officer, who along with other officers has gained control over an arrestee, increases the force he is applying to the arrestee's ankle to the point of breaking it, well after the arrestee was under control.

2. Whether the First Circuit applied the correct analysis in reversing the trial court's post trial granting of qualified immunity, by resolving all factual disputes pertaining to the issue of qualified immunity in favor of the prevailing party.

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

One need only read the majority opinion from the First Circuit in this matter once to perceive that the petitioner's statement of his case is based upon misstatements of the holding of the First Circuit in this case and misstatements of what is contained in the record in this matter.

The petitioner claims that the First Circuit held that the petitioner was responsible for a constitutional violation merely for using a "pain compliance technique" and not crediting a suspect's claim of pain. As the First Circuit opinion clearly points out, the case was not tried on that theory, the jury was not asked to find liability on that theory, and the First Circuit was not reversing the trial judge's granting of judgment as a matter of law based upon that theory.

The First Circuit rested its decision on the proven facts, including a review of a video tape of the incident involved here, that "Jones increased the force he used to restrain Jennings after Jennings had ceased to resist and after Jennings had announced his prior ankle injury. That increased use of force broke Jennings' ankle". (Pet. App. 17).[1]

---

[1] References to the Record Appendix filed with the First Circuit are designated "R" in this brief. References to the petitioner's Appendix filed in this appeal are designated "Pet. App.". References to the respondents Appendix here are designated "Resp. App.".

The First Circuit was totally consistent with Fourth Amendment case law as it related to qualified immunity. The First Circuit considered all of the circumstances pertaining during the arrest, even including circumstances that were not favorable to the respondent.

Although the court did rule that under the circumstances of this case the jury would have been entitled to exercise its common sense in determining that Jones had used excessive force, it also found that the jury had the benefit of expert testimony that supported its verdict.

The First Circuit did not hang its decision on a single opinion from another circuit in order to find that the law in this matter, for purposes of qualified immunity, was clearly established. The First Circuit's decision in this matter is supported by case law from the Supreme Court of the United States.

Finally, while it is true that the dissenting opinion in this matter requested guidance from this court as to the role of the judge vis-a-vis the jury in fact bound qualified immunity determinations, this very case has cleared up this issue with respect to the First Circuit, the *only circuit* cited by the petitioner as ever having articulated any concern about this issue.

RESPONDENT'S COUNTERSTATEMENT OF THE FACTS DEVELOPED AT TRIAL

On July 14, 2003, members of the Rhode Island State Police were posing as customers (R536) inside a building maintained as a cigarette store on Narragansett Indian tribal land in Charlestown, Rhode Island waiting for uniformed members of the police to arrive to execute a search warrant and seize cigarettes. (R534). When uniformed officers arrived in the parking lot to commence the raid the undercover officers inside the building went into action (R539, 540) and were initially perceived by the tribal workers within the store as robbers. (R199, 200). There was initially some physical exchange between undercover officers and tribal members.

After the initial disruption subsided, Adam Jennings and several other workers were instructed to sit down in chairs behind the counter of the store. They all complied. (R546).

Jennings, however, was yelling at the officers words to the effect that they had no right to be on the tribal land and that they had man-handled his mother when the raid began. (R141, 142, 564, 572, 573).

There came a time when Trooper Bell, who was in charge of the situation within the trailer, finally told Jennings that he had to leave the trailer. Bell did not inform Jennings that his intent was to place Jennings under arrest; he merely told him to "leave". (R561, 562).

In immediate compliance with the instruction of Trooper Bell, Jennings got up from his seat and attempted to leave the building. (R561). Then Bell yelled to other officers "cuff him". (R553). Taken completely by surprise, Jennings exclaimed "I'm not getting arrested" or words to that effect. (R554). The petitioner observed Bell speaking to Jennings while Jennings was still seated behind the counter and saw and heard Bell inform Jennings that he was "kicked out". (R120, 121, Resp. App. 2).[2]

Several officers descended upon Jennings to place him in custody. The officers wrestled Jennings to the floor (R555) and pinned him on his stomach. (R310).

While Jennings was lying face down on the floor his *left* arm was trapped under his torso. His right arm was by his side. (R311, Resp. App. 10).[3] Jennings

---

[2] Curiously, the petitioner also testified that he was still outside the building when he heard Ken Bell say "you are out of here, you are under arrest." (R129). The petitioner was not only self-contradictory about where he was; he contradicted Bell, who admitted he had never advised Jennings that he was being placed under arrest. (R561, 562).

[3] At trial the petitioner made the issue of whether one hand was still concealed an important part of his claim that his actions were objectively reasonable. Defense counsel established through the testimony of Trooper Hill that Hill had extracted Jennings left arm from underneath his torso and through the testimony of the petitioner that both hands were initially concealed by his body near his waistband. (R123). In his brief the petitioner inaccurately cites to the record (R338, 339) for the proposition that Jennings himself admitted that his *right* hand was still under his torso when his ankle was broken. (Pet. App.

(Continued on following page)

became completely passive to the point where Trooper Hill, once he extracted Jennings' only unexposed hand from underneath his torso, stood up from his position at Jennings' left shoulder, and left. (R151, 152). Jones makes the breathtaking claim that the "*uncontradicted* testimony is that Jennings. . . . continued his active resistance until he was flex cuffed, after the injury." (Pet. App. 9). No fewer than three witnesses and a state police video contradicted this claim at trial. Adam Jennings, Domingo Monroe and Daniel Piccoli all testified in one way or another that Jennings was not resisting. (Jennings at R310-314, Resp. App. 9-13), (Monroe at R253, 254, Resp. App. 7-9), (Piccoli at R209-212, Resp. App. 3-7).

Well after Trooper Hill got up from the group of officers on the floor that was administering to Jennings, Trooper Jones broke Adam Jennings ankle

---

6). Reference to the record reveals that Jennings did not say *which* hand was under his body. (R338, 339, Resp. App. 14, 15). The petitioner has mischaracterized the record. However, Jennings also testified that only one arm was initially under his body and it was his left arm. (R311, Resp. App. 10). It was, therefore, curious for the petitioner to claim that the First Circuit opinion failed to acknowledge that Jennings' other hand was under his body at the time of injury, (Pet. App. 5) since the evidence in the case, in a light most favorable to Jennings, was that he was mistaken about whether a hand was still under his torso when his injury occurred since the evidence indicated that the only hand trapped under Jennings torso (Jennings' left hand) was extracted by Hill well before Jennings' injury. The First Circuit failed to acknowledge that Jennings' "other hand was under his body" because it wasn't.

with his bare hands. (R122). He did so by gratuitously increasing his force on Jennings ankle.

The jury returned a verdict against Trooper Jones both on Jennings' excessive force claim and the claim based on assault and battery pursuant to Rhode Island common law. Jones filed a post-trial motion for JMOL which was granted by the district court judge based upon his conferral of qualified immunity. Jones failed to pursue conditional rulings on his motions for a new trial and remittitur. The respondent appealed the district court decision. The First Circuit has remanded the case to the district court on rulings on these two motions, having reversed the district court's conferral of qualified immunity.

REASONS FOR DENYING THE WRIT

I. THE FIRST CIRCUIT DID NOT ABANDON THE ESTABLISHED TESTS AND PRINCIPLES USED TO EVALUATE POLICE CONDUCT IN EXCESSIVE FORCE CASES.

A. THE FIRST CIRCUIT DID NOT DISGARD THE TOTALITY OF THE CIRCUMSTANCES TEST.

The decision of the First Circuit carefully examined the totality of the circumstances in ruling that the trial court erred in granting qualified immunity to the petitioner.

The court recognized in the first page of its decision that Adam Jennings initially resisted the arrest and that the resistance required the use of force by state police to subdue him.

The opinion recognized that Jones' application of a compliance technique, deemed "the ankle turn control technique" by the petitioner, was appropriate to gain control. (Pet. App. 20).

The opinion also contemplated that Trooper Hill had extracted Jennings left hand from where it had been trapped under Jennings' torso. (Pet. App. 5).

The First Circuit viewed a video tape that was in evidence during the trial. The video tape showed Trooper Hill stand up from the group on the floor and walk away after he had extracted Jennings left arm from underneath his torso. The appellate court recognized that "several seconds" passed from the time Hill got up and left until "Jennings yelled in pain and his ankle was broken". (Pet. App. 5, 6).

The court contemplated that Jones' own appellate brief described the period from Hill's departure to Jennings' ankle having been broken as being 12-15 seconds. (Pet. App. 6).

The court considered the testimony of the respondent, who said with respect to the timing of his injury:

> Q: (By Attorney Bradley) And prior – I know it's hard to describe this in terms of time, but did there come a point in time while your

arm was trapped underneath your body where you had completely ceased to move?

A: (Jennings) Yes.

Q: Ok. And after your arm was removed from your body, from underneath your body, did you then resume any kind of physical movement?

A: No, I did not.

(R.312, 313). (Resp. App. 12, 13).

Among the circumstances in the totality of circumstances the court considered was the testimony of Dan Piccoli, who testified that while Jennings was on the floor there was no movement on Jennings' part. (R209-212). (Resp. App. 3-7).

The court considered the testimony of Domingo Monroe who testified that Jennings was pinned by several officers and had no way of moving. (R253, 254). (Resp. App. 7-9).

Applying the factors of *Graham v. Connor*, 490 U.S. 386 (1989) the court clearly considered that Jennings was not being arrested for anything as grievous as assault with a deadly weapon but rather was being arrested for "complaining loudly that the Rhode Island Police had no right to be on his property, and that he expressed concern "over their treatment of his mother". (Pet. App. 4).

The court examined whether Jennings posed a threat to the safety of the officers or others and whether he was actively resisting.

It is unclear from the petitioner's brief what circumstances in the "totality of these circumstances" the First Circuit failed to consider, and what relevance those circumstances would have had.

This court should not grant the writ of certiorari based upon the First Circuit's alleged failure to consider the totality of the circumstances confronting the petitioner.

B. THE FIRST CIRCUIT DID NOT DEPART FROM OTHER CIRCUITS THAT HAVE ESTABLISHED THE MOMENT OF HANDCUFFING AS A BRIGHT LINE FOR DETERMINING WHEN FORCED (WHETHER USED OR INCREASED) IS EXCESSIVE.

The petitioner asserts that the First Circuit departed from a bright line rule that does not exist. The petitioner seems to argue that there are no restrictions on a police officer's use of force until the arrestee is handcuffed. In attempting to create this as an issue, the petitioner continues to insist, as he must, that the respondent was resisting arrest and control right up until the time that the petitioner broke his ankle. The respondent never argued at trial or on appeal that the respondent had a duty to *de-escalate* his force prior to the respondent being

handcuffed but rather that it was excessive force to increase force for no reason on a compliant arrestee. The First Circuit grasped this simple point.

The First Circuit noted that it was error for the district court to have failed to appreciate the distinction between the utilization of a compliance technique and an increase in force. (Pet. App. 41, 42).

There is no bright line rule that sanctions a police officer's increase in his use of force on a controlled and passive arrestee merely because he is not yet handcuffed. The cases cited by the petitioner do not establish this as a rule of law.

The failure of the petitioner to observe the distinction in this case between the utilization of force and a baseless increase in force erroneously mischaracterizes the issue and fails to provide a basis for granting the writ.

C. A JURY'S "COMMON SENSE" CAN BE USED TO DETERMINE THE REASONABLENESS OF AN OFFICER'S CONDUCT.

Not only may a jury's common sense in obvious cases be used to determine the reasonableness of an officer's conduct, *Isom v. Town of Warren*, 360 F.3d 7 (1st Cir. 2004), *Kopf v. Skyrm*, 993 F.2d 374 (4th Cir. 1993), *Adewale v. Whalen*, 21 F. Supp. 2d 1006 (D. Minn. 1998) but the jury in this case was *not left* to rely solely on its own common sense but had the

benefit of the expertise of Lieutenant Delaney. Lieutenant Delaney was an employee of the Rhode Island State Police who testified that he was responsible for the training of state police officers in control techniques. (R122).

Delaney testified that an officer is supposed to adjust the amount of force he uses according to what the arrestee is doing. In other words the use of force analysis is a "two way street", meaning that if the level of resistance changes, the level of force should be adjusted upward or downward correspondingly:

> Q: (By Attorney Bradley) So that even if an officer feels at one point in time that that one level of force is appropriate he is supposed to adjust the amount of force he uses in response to a lessening of the arrestee; isn't that true?
>
> A: (Trooper Delaney) Yes. That would be the trooper's own assessment of where that lies, yes, sir.
>
> Q: Well, that would be his assessment, but he is supposed to make that assessment, isn't he?
>
> A: Yes.
>
> Q: And that is what you call, in your vernacular, the de-escalation of force.
>
> A: Correct.

(R448).

While it is true that Delaney defended the use of Jones' ankle turn control technique, he explained its propriety in terms of it being *maintained* and clearly disapproved of an increase in the force used with respect to an arrestee whose level of resistance went down or, in fact, was nonexistent. This distinction was noted by the First Circuit. (Pet. App. 22, 23).

Delaney's expert testimony, when considered in conjunction with the testimony of Jennings, Piccoli, and Monroe, would have established for the jury that there was no justification under accepted police practice for there to be an *increase* in the force used by Jones because Jennings was under control when Jones escalated the force.

Included in the body of information presented to it that the jury could have relied upon to exercise a common sense determination of whether or not Jones' force was excessive was the testimony of *Jones himself*:

> Q: (By Attorney Bradley) Is it your understanding that the use of force can escalate – your use of force can escalate in direct response to an escalation of force on the part of the arrestee?
>
> A: (Jones) Yes, sir, that is correct.
>
> Q: Now, is the use of force continuum, does it only go in one direction? Do you understand what I mean by that?
>
> A: No, sir.

> Q: If you exert more force on an arrestee in response to the arrestee's escalation of his own force, does the use of force continuum also provide that you are to decrease your force if the arrestee decreases his?
>
> A: If the subject is complying, yes, you will *lessen* the amount of force.

(R103).

The petitioner's contention that this issue is worthy of review is erroneous. The petitioner has presented this court with no suggestion that there is a confusion among the circuits or a discrepancy between the United States Supreme Court and the First Circuit decision at issue here that would justify review. The petitioner's reliance upon *Conn v. Gabbert*, 526 U.S. 286 (1999) in misplaced. Conn did not even examine the question of whether a jury could under any circumstances be allowed to rely on its common sense to determine what constituted excessive force. The case examined whether a judge, in examining whether the law was clearly established for qualified immunity purposes, could deem the right at issue in that particular case to be determined by the use of common sense.[4]

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[4] Curiously, the petitioner claims in his brief that "[T]he parties and the trial court agreed that expert opinion was required, and the First Circuit was not free to reject that determination." (Pet. App. 23). The petitioner did not cite to where in the record the parties stipulated to the necessity of expert opinion, probably because they didn't. In any event, the

(Continued on following page)

D. THERE WAS NO HOLDING IN THIS CASE THAT AN ARRESTEE'S COMPLAINT OF PAIN REQUIRES A LESSENING OF FORCE.

The petitioner here suggests that the "two-member majority instructs officers that they must alter their arrest techniques when an arrestee who is not yet under control says "ow." (Pet. App. 24). Nevertheless, for the petitioner to continue to assert that the record indicated Jennings was "not yet under control" betrays a fundamental failure on the part of the petitioner to accept that the respondent won a verdict, and that because he did, the question of whether the respondent was "under control" has been determined in favor of the Respondent. The proposition contended for by the petitioner here merits little comment. This was not the First Circuit's holding. The principle vindicated by the First Circuit was that the petitioner was not entitled to qualified immunity because an objectively reasonable officer under the circumstances pertaining and known to the respondent should not have *increased* the pressure he was exerting on the respondent's ankle for no reason. The cases cited by the petitioner are irrelevant, the issue fictitious.

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petitioner, without citation to case authority, makes the astounding claim that a legal conclusion of the First Circuit could somehow be preempted by an agreement of the parties.

II. THE FIRST CIRCUIT'S DECISION WAS CONSONANT WITH QUALIFIED IMMUNITY PRECEDENT.

In section II of the petitioner's brief he persists in mischaracterizing the qualified immunity issue in this case as being related to Jones's decision to *use a compliance technique* as opposed to a decision to radically increase the use of force with no justification.

Along the way several mischaracterizations of law and fact are offered.

Wilson v. Layne, 526 U.S. 603 (1999) is erroneously cited for the alleged legal principle that one [court] opinion would not fulfill the burden of "clearly establishing" the law for qualified immunity purposes.

Not only did *Wilson* not hold this; the Supreme Court has ruled that, depending upon the circumstances of the case, there need not be a prior case on all fours with the questioned conduct at all. *Hope v. Pelzer*, 536 U.S. 730 (2002).

Other circuits have rejected qualified immunity claims without a prior case exactly on point. In *Rice v. Burks*, 999 F.2d 1172 (7th Cir. 1993), the Seventh Circuit eschewed the necessity of closely analogous cases where the force used was plainly excessive. *Id.* at 1174. *See, Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1306 (11th Cir. 2000), holding that qualified immunity may be withheld even in the absence of a

similar fact scenario where the constitutional violation is obvious.

The petitioner distorts the record in this case. Arguing the inapplicability of *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997), a case supporting the First Circuit decision with respect to the "clearly established" prong of the qualified immunity test, the petitioner submits:

> The suspect in *Smith* "docilely submitted to arrest . . . " and later his arm was broken. 127 F. 3d at 1418-20. *No evidence* suggests that Jennings was docile, before or after the command to arrest him was given. (Pet. App. 28). emphasis added.

Obviously there was evidence that Jennings was docile for a substantial period of time after the command to arrest him was given. The evidence of three witnesses has been referenced in this brief and was referenced in the First Circuit's opinion. It was why he won his verdict.

The petitioner can no more prevail by insisting on the nonexistence of evidence that is in the record any more than he can prevail by attempting to convince this court that the excessive force issue in this case is about the constitutionality of the employment of a control technique as opposed to an increase in force.

There is no departure from precedent in this case which would warrant the issuance by this court of writ of certiorari.

III. THERE IS NO BASIS FOR THIS COURT TO ISSUE A WRIT OF CERTIORARI IN ORDER TO EXAMINE THE TRIAL JUDGE'S ROLE IN THE DETERMINATION OF FACTUAL DISPUTES IN THE QUALIFIED IMMUNITY CONTEXT.

The petitioner here didn't file a motion for summary judgment based upon qualified immunity. Instead he elected to proceed to trial. Qualified immunity is an immunity from suit rather than a mere defense to liability; unlike an absolute immunity it is lost if a case is erroneously permitted to go to trial. *Scott v. Harris*, 550 U.S. ___, 127 S.Ct. 1769, 1773 fn2 (2007), citing to *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Presumably, the defendant here would have supported his motion with an affidavit or affidavits that would have more clearly staked out the factual and legal grounds for the claim of qualified immunity. The plaintiff presumably would have responded with counter affidavits. If the trial judge granted or denied the motion, either side could have appealed and at the appellate level the reviewing court would have had to view the facts in the light most favorable to the non-prevailing party in making its determination whether there were genuine issues of material fact making the granting or denial of summary judgment inappropriate.

If the plaintiff prevailed the case would be submitted to the jury. The jury would have rendered a verdict and any party who challenged the verdict on a

JMOL motion would have been confronted with the same daunting burden that the defendant was faced with here: overturning a verdict where every dispute as to a material factual issue had to be viewed in a light most favorable to the prevailing party, a posture no different from the posture of this case when it went up on appeal to the First Circuit.

This issue is not worthy of Supreme Court review. The rules that apply have not been challenged by the petitioner. The petitioner has failed to direct this court's attention to any cases other than from the First Circuit that have alluded to the issue. *Kelley v. La Force*, 288 F.3d 1, 7 (1st Cir. 2002) and *Ringuette v. City of Fall River*, 146 F.3d 1, 6 (1st Cir. 1998) both alluded to the question of the trial judge's role in factual determinations in the context of qualified immunity. It was an issue in neither case although the *Ringuette* court approved of the submission of interrogatories to the jury to resolve factual disputes upon which qualified immunity decisions depend. *Ringuette* at 6.

In this case, the First Circuit, consonant with every other Circuit, examined the record and, consistent with the verdict, resolved all factual disputes apparent from the record in favor of the respondent.

In doing so, its decision did not conflict with other First Circuit opinions, other Circuits opinions, or the opinions of this court.

CONCLUSION

The petitioner's brief has claimed that evidence did not exist which existed, that evidence existed which did not exist, mischaracterized the holdings of other cases, and has mischaracterized the holding of the instant case-all in effort to gain "toe hold" in his quest to be granted a writ of certiorari.

Only by doing so could this petitioner hope to void the inevitable conclusion that this case was a relatively straightforward one where a law enforcement officer's escalation of force was, viewed in the light most favorable to the verdict, unwarranted and inexplicable. This was not a case fraught with subtleties; it was not a case where an officer had to make a split-second decision under trying circumstances, as is made most evident in the video tape that was viewed by the jury.

The petitioner simply ran rough shod over a precept that he himself acknowledged; that it is wrong to increase the force you use upon an arrestee without a reasonably objective reason for doing so. The petitioner's case was won on the facts that were accepted by the jury; his appeal was won because the First Circuit was duty bound to view any disputed facts that arose in the trial in a light most favorable to the verdict. The petitioner has not demonstrated that there is any issue involved in this case as it would relate to qualified immunity that needs resolution by this court. The petitioner's articulated concern

over the role of judge vis-a-vis jury in the determination of qualified immunity issues is interesting, but also not worthy of a writ of certiorari. The only Circuit Court of Appeals to have raised concern over these issues is the First Circuit and the First Circuit has resolved the issue, as it should, by concluding that, not unlike any other fact dispute, factual disputes concerning qualified immunity are properly placed in the hands of the jury, consistent with the Seventh Amendment.

The respondent respectfully urges this court to deny the writ of certiorari.

Respectfully submitted,

MICHAEL BRADLEY
(Bar admission pending)
39 Grove Avenue
Westerly, RI 02891
Tel 401-596-0808
Fax 401-596-1327

Counsel for Respondent,
Adam Jennings

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PAULLA DOVE JENNINGS, ET AL., Plaintiffs, vs. STATE OF RHODE ISLAND, ET AL., Defendants.	C.A. NO: 03-572T MARCH 21, 2005 10:00 A.M. PROVIDENCE, RI

BEFORE THE HONORABLE ERNEST C. TORRES
CHIEF DISTRICT JUDGE
(JURY TRIAL)

* * *

[March 21, 2005]

[102] THE COURT: Overruled. You may answer.

THE WITNESS [Kenneth Jones]: Can you repeat the question, ma'am.

MS. PARTINGTON: May I have the question read back, your Honor.

THE COURT: Read the question back, please.

(Pending Question Read)

A. I wasn't sure.

Q. At the time did you know how many people were inside the trailer?

A. No, ma'am.

Q. At some point, I believe you've already described it for the jury, you entered the trailer area?

A. Yes, ma'am.

Q. And could you tell the jury as soon as you walked into the trailer what did you observe?

A. I observed several subjects sitting behind the counter, I observed detectives walking around, and I observed Detective Bell speaking to the subject behind the counter.

Q. Do you now know who the subject was that Detective Bell was speaking to at that point?

A. Yes, ma'am.

Q. And who was that?

A. Adam Jennings, ma'am.

[103] Q. And what happened next?

A. I heard Detective Bell tell the – Mr. Jennings to "sit, that's it, you're out of here," and "you're under arrest," and Mr. Jennings stated, "I'm not getting arrested," and that's when a struggle ensued.

Q. Did you hear members of the Rhode Island State Police say something to the effect of "cuff him"?

A. Yes, ma'am.

Q. What did Adam Jennings do when they said "cuff him"?

A. He said, "I'm not getting arrested" and –

* * *

[March 22, 2005]

[17] A [Dan Piccoli]. Outside.

Q. Were you on the ground?

A. Yes.

Q. How tall are you, Mr. Piccoli?

A. 6'4.

Q. And when you observed this situation on the ground, tell me what you saw?

THE COURT: Excuse me, when you say you were on the ground, do you mean you were standing on the ground?

THE WITNESS: Yes, standing outside on the ground.

MR. BRADLEY: I'd like to withdraw my question and do a little bit better job here.

Q. You were standing on the ground, would that mean the parking lot of the Smoke Shop?

A. Yes.

Q. Where were you relative to the stairs that were entering the Smoke Shop?

A. Right next to them.

Q. As you face the Smoke Shop from the parking lot, were you outside the stairs to the right?

A. Yes.

Q. And could you describe what you saw, if anything, going on inside the door of the Smoke Shop?

[18] A. Whew, I'm just nervous. There was a gentleman on the ground and the State Troopers were on top of him, they were just on top of him.

Q. Were you able to see any part of the person who was on the floor?

A. Yes.

Q. And were you able to see police officers next to him?

A. Yes.

Q. And during the time you were watching this, did you see any violent movement on the part of the person on the ground?

MS. PARTINGTON: Objection, your Honor. Form.

THE COURT: The word "violent"?

MS. PARTINGTON: Yes.

THE COURT: I'll sustain the objection.

Q. Mr. Piccoli, could you describe the movements, if any, of the person who was on the floor?

A. There weren't any.

Q. And at the time that you were watching this, were you able to view an officer, an African-American officer who was holding on to Adam Jennings' leg?

A. Yes.

Q. And do you know who that officer was?

A. Well, I didn't know who he is until after; Jones.

[19] Q. How did it come to pass that you discovered afterwards who he was?

A. Through television and people that told me from the paper who he was. Whew . . .

Q. Did there come a point in time –

THE COURT: Would you like a glass of water, Mr. Piccoli?

THE WITNESS: Could I? I'm just nervous.

THE COURT: I wish I had something more to offer you.

THE WITNESS: No, that's all right.

THE COURT: All right, continue, Mr. Bradley.

Q. Did there come a point in time when you heard the person on the floor say something?

A. Yes.

Q. What did you hear him say?

A. He said something in regard to 'Let go, you're going to break my ankle.'

Q. And what, if anything, did the officer who was holding on to his ankle, do?

A. Just twisted more.

Q. Were you able to see an expression on his face as he did it?

A. Yes.

Q. What was it?

[20] A. It was like his teeth, like grinning, you know what I mean? Like, do you know what I'm saying, like grinning his teeth.

THE COURT: Did you say "gritting" or "grinning?"

THE WITNESS: Well, you know, like if you're trying to open something and it won't, you know what I'm saying.

THE COURT: Gritting the teeth?

THE WITNESS: Yeah.

Q. What, if anything, did Adam Jennings say in response? Withdrawn.

What, if anything, did you hear from Adam Jennings in response?

A. I heard him scream.

MR. BRADLEY: I don't have any other questions.

* * *

[61] (Videotape Shown)

MR. BRADLEY: Stop it, please.

Q. Mr. Monroe, what we just viewed, can you tell us in your own words whether you saw that scene on July 14?

A. I did see that scene, but another thing is, its like –

THE COURT: The question is did you see that scene.

THE WITNESS [Domingo Monroe]: Yes, I did see that scene, yes.

Q. Now, how would you describe the, in your own words, what you saw in terms of Adam Jennings being taken down to the floor?

MS. PARTINGTON: Objection, asked and answered.

THE COURT: Sustained.

Q. Did there come a point in time after Adam Jennings was taken to the floor, where he stopped moving?

A. I don't understand the question.

Q. Did there come a point in time after the takedown of Adam Jennings when everything became calm?

A. It stayed calm when he was brought down. I mean there was about a good five or six officers on him where he couldn't move, so I knew – there was no way for him to move.

Q. Did there come a point in time when you heard Adam Jennings say anything as it would relate to his leg?

[62] A. Adam Jennings said, You're hurting my ankle, it was already injured at one point in time, you're hurting my ankle, and then the officer said, Well, if you – if you wouldn't resist, then your ankle – then your ankle wouldn't be hurting, and then as he said that, he cranked down harder on his ankle.

Q. At the point that the officer – withdrawn. Do you know what officer said those words to the effect of, "if you wouldn't resist," etc.?

A. That was Officer Jones.

Q. And at the point that he said, "If you wouldn't resist," or words to that effect, were you able

to see from your vantage point whether Adam Jennings was, in fact, resisting?

A. He was not resisting. Like I said before, he had about a good five or six officers on him over his back, so there was no way of him moving.

MR. BRADLEY: No further questions.

* * *

[118] A [Adam Jennings]. No, I did not.

Q. And did you do anything to any other police officer to physically threaten them?

A. No, I did not.

Q. As you were heading toward the door, what was your intention, what were you going to do?

A. Leave the building.

Q. And what happened next?

A. When I got to the door, and next thing I know somebody was saying, you're under arrest and whatever. I said, What do you mean I'm under arrest, they just told me to leave the building. And then suddenly there was hands all over me.

Q. Okay. And what was your emotional state at the point this was going on?

A. Shock and surprise. I just couldn't believe what was happening.

Q. And did there come a point in time when you were taken down to the floor?

A. Yes.

Q. And when you were taken down to the floor, what was your body position, by that I mean were you – I won't use prone and supine, but was your stomach down or up?

A. I was stomach down.

Q. And when you were stomach down, can you describe [119] the position of your hands?

A. I had one hand down by my side, I had my other hand was trapped up – like my hand was up by my shoulder, trapped underneath me like this.

Q. Which hand was down by your side, which arm was down by your side?

A. My right hand.

Q. And I'll venture that the one that was trapped was your left?

A. Yes.

Q. Did there come a point in time when persons were yelling at you to show your hands?

A. Yes.

Q. And did you?

A. Yes. I told them, I've got – they said something about put your hands behind your back. I said

I've got the one hand I can put behind my back – behind my back. I said the other hand I can't move it, there's too much weight on me, too much weight on my stomach. I could not move it.

Q. While all of this is going on, did there come a point in time when you realized someone was exerting pressure on your foot?

A. Yes.

Q. And at the time that you felt that pressure being [120] exerted on your foot, did you know who the person was that was doing it?

A. I had no idea. No, I didn't.

Q. And while you were on the floor with this arm trapped underneath you, where did you feel the pressure, if any, on your body from officers that were on top of you?

A. On my head, on my neck, on my back, on my leg, on my foot being – that was being twisted.

Q. Did you clearly communicate your physical inability to produce your arm?

A. Yes, I did.

Q. Now, did there come a point in time when your left arm was extracted from underneath your body?

A. Yes.

Q. And prior – I know it's hard to describe this in terms of time, but did there come a point in time while your arm was trapped underneath your body where you had completely ceased to move?

A. Yes.

Q. Okay. And after your arm was removed from your body, from underneath your body, did you then resume any kind of physical movement?

A. No, I did not.

Q. After your arm was removed from underneath your [121] body, did the pressure that was being exerted on your foot, cease?

A. No, it did not.

Q. What, if anything, did you say to this person who was holding on to your foot?

A. You're breaking my ankle.

Q. Did you mention anything about surgery?

A. Yes, I told him, I've had surgery on that ankle before and you keep twisting it you're going to break it.

Q. Now, you've listened and seen the Rhode Island State Police videotape a number of times, haven't you?

A. Yes, I have.

Q. Are you able to testify as to whether or not – withdrawn. Did you feel any – at any point during this – at any point after you said, I just had surgery, you're breaking my ankle, or anything like that, did you feel any change in the amount of pressure that was being exerted on your foot?

A. Yes, I did.

Q. And could you describe that?

A. It was almost, not just incremental, he was turning it, I'm telling the guy, look, you're going to break my ankle and so forth, and he twists it more.

Q. And in the State Police video do you recall hearing [122] yourself scream?

A. Yes, I do.

Q. Is that scream contemporaneous – withdrawn. Did there come a point in time when your ankle was broken?

A. Yes.

Q. Was it broken by the exertion of the person who had his hand on your foot?

A. Yes, it was.

MS. PARTINGTON: Objection, your Honor, calls for an opinion.

THE COURT: Overruled.

Q. It was caused by –

THE COURT: You can cross-examine on that point if you wish, Ms. Partington.

Q. When you felt that increase in pressure, did you feel an immediate increase in your pain?

A. Yes, I did.

Q. And is it when you feel that immediate increase in your pain that we all can hear you scream on the video?

A. I believe so. I think I yelled a couple of times.

Q. Now, what – after you screamed, what happened?

A. Eventually they let me go and told me to stand up, and I told them, you know, I said I can't stand up on this, my ankle's broken. They kind of picked me up, and I hobbled out with them holding me out the door.

* * *

[146] A. That might have been when it broke. I know I felt it, and it was – when I was on the ground it was kind of a blur as to exactly what was going on. I know my one hand was trapped underneath me, the other hand on the side. I know I'm telling the people that, you know, I've broken that ankle before, I'm telling them people, I can't – I got the one hand that I can't move behind my back, I can't move my other hand, there's too much weight on me.

Q. But your ankle was broken while you had at least one hand underneath your body, wasn't it?

A. It seems like it. I don't know.

MS. PARTINGTON: Your Honor, I'd like to publish testimony once again to Mr. Jennings.

Q. Could you look at line 18. Can you see that, is it clear?

A. Yes.

Q. "And I said, you just broke my ankle. Man, why did you do that? I said, you just broke my ankle, and somebody reached down and the arm that was underneath me, they attempted to try to put it behind me or to try to pull it out from underneath me." Did I read that correctly?

A. Yes, you did.

Q. So that means your ankle was broken before your [147] hands were completely out from underneath you, doesn't it?

A. Okay.

* * *

(5)

No. 07-654

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In The

Supreme Court of the United States

KENNETH JONES,

Petitioner,

v.

ADAM JENNINGS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF

Kenneth Jones
By His Attorneys,

PATRICK C. LYNCH
Attorney General

REBECCA TEDFORD PARTINGTON*
Assistant Attorney General
150 South Main Street
Providence, RI 02903
Tel. (401) 274-4400 ext. 2303
Fax (401) 222-2995

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. CERTIORARI IS NECESSARY TO DETERMINE WHETHER JENNINGS ARTICULATED A CONSTITUTIONALLY PROTECTED RIGHT.

In addressing a claim under 42 U.S.C. 1983, a Court must first "determine whether the plaintiff has alleged the deprivation of an actual constitutional right." *Abreu-Guzman v. Ford,* 241 F.3d 69, 73 (1st Cir. 2001) (citations omitted). Second, the court must "proceed to determine whether the right was clearly established at the time of the alleged violation." *Id.* (citations omitted). If the answer to either of these questions is "no," then the plaintiff's claim must be dismissed. In this case, Jennings has failed to articulate a constitutionally protected right with any degree of specificity. At most times he has alleged a very general right under the Fourth Amendment to be free from excessive force. That is not enough to state a claim for excessive force, or to defeat a claim for qualified immunity. If the late-developing theory that Jones increased the pressure on Jennings' leg in the twelve seconds under review is accepted, the outcome is no different. No court has ever held that a suspect who is refusing the lawful commands of police officers has the right to be free from increased pressure on a limb before he is under control and handcuffed. As in *Wilson v. Layne,* 526 U.S. 603 (1999), "the constitutional question presented in this case is by no means open and shut." The constitutional weight of authority is on Jones' side, and the First Circuit has muddied the waters with its unwieldy decision.

II. THIS COURT SHOULD GRANT CERTIORARI TO DEFINE AND CLARIFY THE SIGNIFICANCE OF WHEN A SUSPECT IS "UNDER CONTROL" FOR DETERMINING WHETHER FORCE USED DURING AN ARREST IS EXCESSIVE.

Although an Eighth Amendment case, *Hope v. Pelzer*, 536 U.S. 730 (2002) concluded that qualified immunity was not available to officer based in part upon the fact that the inmate was completely subdued and handcuffed before being hitched to a post in the hot Alabama sun for seven hours. In finding that no case law was needed and the constitutional violation was obvious, this Court wrote that "[a]ny safety concerns had long since abated by the time petitioner was handcuffed to the hitching post because Hope had already been subdued, handcuffed, placed in leg irons, and transported back to the prison." 536 U.S. at 738. This Court declined to cloak the prison guard with qualified immunity based on the "clear lack of an emergency situation." Even this Court in *Hope* intimated that the hitching would have been permissible during the period "required to address an immediate danger or threat." 536 U.S. at 747. Contrast the situation here, where Jennings was not handcuffed or under control, was still resisting arrest, and when it was far from clear whether he was armed, at the time of the injury. The First Circuit's decision cannot be reconciled with *Hope,* and should not be allowed to confuse law enforcement officers in the performance of their duties.

III. THE FIRST CIRCUIT'S DETERMINATION THAT JONES' CONDUCT WAS SO OBVIOUS THAT NO PRIOR CASELAW WAS NEEDED EFFECTIVELY EVISCERATES THE QUALIFIED IMMUNITY DOCTRINE.

Notwithstanding that the uncontradicted testimony was that Jones' actions were reasonable given the totality of the circumstances, the First Circuit found that his conduct was so obviously a violation of the Fourth Amendment that he did not need prior caselaw to put him on notice. *Hope v. Pelzer, supra,* advanced the notion that in certain exceptional circumstances, no prior case law directly on point is necessary to establish a constitutional violation. This case does not fit into the parameters of that decision. In *Hope* this Court found that the tethering of a shirtless prisoner to a "hitching post" so that his arms were raised and immobile, without affording him water or bathroom breaks – contrary to practice and policy – violated the constitution, and that the prison guards who administered this punishment did not need prior caselaw to know that. *Hope* is thus reserved for cases where "obvious cruelty" is inherent in the behavior under scrutiny. In this case, it simply cannot be said that the use of a control technique taught and used by police officers in Rhode Island and throughout the country is "antithetical to human dignity." 536 at 745.

Although Jennings excerpts a few sentences from Lt. Delaney's testimony, he still cannot provide any testimony that: 1) a reasonable officer in Jones' situation would have done anything differently; 2) that a reasonable officer in Jones' situation would have decreased pressure on Jennings' leg or; 3) that a reasonable officer in Jones' situation would not have increased the pressure on Jennings' leg. To support his conclusion, Jennings asks that the Court extrapolate all of that from a few bits of testimony that are taken completely out of context and, rather, should be read in its entirety. Once again, it is important to note that Lt. Delaney testified that Jones' actions were reasonable and consistent with how the technique is taught in the Rhode Island State Police Academy, and that the increase and decrease in the levels of force referred to the levels in the Use of Force Continuum.

IV. CERTIORARI IS NECESSARY TO DETERMINE WHETHER A SINGLE DECISION FROM ONE CIRCUIT "CLEARLY ESTABLISHES" THE LAW IN ANOTHER FOR PURPOSES OF QUALIFIED IMMUNITY.

There is presently a split in the circuits, recently widened by the First Circuit's decision in this case, as to how the law may be "clearly established" for qualified immunity purposes.[1] Although this Court spoke

[1] For a detailed discussion of the circuit split, see the amicus curiae brief filed by the states of Colorado, Alaska,

(Continued on following page)

clearly in *Wilson v. Layne, supra*, several Circuits are straying from its teachings. In *Wilson*, this Court found that the actions under review had violated the Constitution, but that no case with the requisite degree of specificity had put the defendants on notice. *Wilson* built upon the framework established by this Court in *Anderson v. Creighton,* 483 U.S. 635 (1987) and *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). Those decisions teach that "'[C]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Wilson,* 526 U.S. at 615, quoting *Anderson,* 483 U.S. at 640. The right must be defined at the appropriate level of specificity before a court can determine whether it was clearly established. As stated above, Jennings failed at the threshold to articulate exactly what right was infringed.

Arkansas, Florida, Hawaii, Idaho, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, North Dakota, Pennsylvania, South Dakota, Virginia and Wisconsin in support of granting certiorari.

Wilson provided qualified immunity to law enforcement officers in part because the suspects did not cite "any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." 526 U.S. at 617. The suspects in *Wilson* relied upon a case decided on summary judgment from another circuit in their quest to have the federal courts declare the right "clearly established," much like the present case. In rejecting that argument, this Court found that the law was in an undeveloped state, and that the officers could not have been "expected to predict the future course of constitutional law." *Id.* (citations omitted). As in this case, where the score is two judges finding the law to be clearly established, and two who do not, the following applies with equal force: "if judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.* at 618. Governmental officials should not be expected to be "seers in the crystal ball of constitutional doctrine." *Westberry v. Fisher,* 309 F.Supp. 12, 17 (D.Me. 1970).

Even if this Court accepts Jennings' increased torque argument, qualified immunity should still protect Jones, since there are no decisions that put him on notice that such conduct exceeded constitutional boundaries. Jones is not arguing that there be a case identical to the situation facing him, but all of the

cases involving use of control techniques ultimately determine that the officers' discretion should be given deference, and hold that no constitutional violation has occurred. Neither Jennings nor the First Circuit could point to any case in any circuit establishing that the unlawfulness of Jones' conduct was apparent.

In arguing that the First Circuit was correct, Jennings makes the remarkable statement that "Jennings was docile for a substantial period of time." This is refuted by the record and indeed the First Circuit notes that at most, it was twelve seconds after Hill stood up that the injury occurred. To allow this reasoning to stand would render the defense of qualified immunity meaningless.

A comparison of *Smith v. Mattox,* 127 F.3d 1416 (11th Cir. 1997) and the present case makes this crystal clear. First, *Smith* was a case on appeal from denial of qualified immunity. This procedural posture – an interlocutory appeal on an incomplete record, with the Court taking all facts in favor of the injured suspect, should make this decision unworkable for qualified immunity purposes in *any* jurisdiction. Second, in *Smith* the arrestee had run from police, but had been caught and taken to the ground when he was arrested while being handcuffed and subsequently injured. There is an entire body of caselaw on handcuffing, and few cases on the use of compliance techniques. *Smith v. Mattox* fits into the former category, not the latter. Further, the cases discussing compliance techniques support Jones, not Jennings.

CONCLUSION

The doctrine of qualified immunity is necessary if State government is to effectively operate. This case cries out for the application of that doctrine as a complete bar to the Section 1983 claims against Trooper Jones. Should this Court decline to give the "breathing space" government officials need to perform their job, the greater the potential for state employees to incur litigation costs and potential judgments under section 1983. Given that the State not only indemnifies their employees against such judgments, but also assumes the costs of their defense, these financial costs fall directly upon the State. Further, although Section 1983 lawsuits undoubtedly deter some unlawful behavior, they can, absent appropriate qualified immunity protection, make it more difficult to recruit and retain high-quality employees. Indeed, this Court has long recognized these and other "social costs" of suits against government officials, including "the expense of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," as well as "dampen[ing] the ardor of all but the most resolute, or the most irresponsible" government officials "in the unflinching discharge of their duties." *Harlow,* 457 U.S. at 818.

For these reasons, and for the reasons previously set out in his Petition, Kenneth Jones respectfully requests that certiorari be granted.

Respectfully submitted,

Kenneth Jones
By His Attorneys,

PATRICK C. LYNCH
Attorney General

REBECCA TEDFORD PARTINGTON*
Assistant Attorney General
150 South Main Street
Providence, RI 02903
Tel. (401) 274-4400 ext. 2303
Fax (401) 222-2995

**Counsel of Record*

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NO. 07-654

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH JONES,

Petitioner,

vs.

ADAM JENNINGS,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF FOR THE STATES OF COLORADO, ALASKA, ARKANSAS, FLORIDA, HAWAII, IDAHO, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NORTH DAKOTA, PENNSYLVANIA, SOUTH DAKOTA, VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JOHN W. SUTHERS
Attorney General of Colorado

DANIEL D. DOMENICO
Solicitor General
Counsel of Record

ELIZABETH H. McCANN
Deputy Attorney General

JESS A. DANCE
Assistant Attorney General

CHRISTINE WILKINSON
Assistant Attorney General

1525 Sherman St.,
7th Floor
Denver, Colorado 80203
(303)866-5634

[Additional counsel listed on signature page]

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INTEREST OF THE AMICI CURIAE[1]

State officers and employees are frequently defendants in actions brought under 42 U.S.C. § 1983. Thus, Amici States have a critical interest in how the federal courts determine whether the law concerning a constitutional right was "clearly established" for purposes of the qualified immunity analysis those cases often involve.[2] Because the decision of the court of appeals exacerbates a split in the circuits as to whether the holding of one court of appeals can be said to clearly establish governing law for state employees even in other circuits, Amici States have an interest in this Court's settling that question.

A public employee is entitled to qualified immunity unless a plaintiff can show that the constitutional right alleged to have been violated was "clearly established" at the time of the alleged violation, not "at a high level of generality," but "in a more particularized, and hence more relevant, sense," *Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004) (per curiam) (quotation omitted). A right is only clearly established when a factually similar precedent "squarely governs" the case at issue, *id.* at 201, or when the constitutional violation was so

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[1] Pursuant to Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief.

[2] While Amici States disagree with the First Circuit's holding that Officer Jones' conduct constituted excessive force, (App. 30-31), this amicus brief focuses solely on the First Circuit's errors in the qualified immunity analysis.

"obvious" that "general tests . . . 'clearly establish' the answer, even without a body of relevant case law." *Id.* at 199. These rules serve the fundamental proposition that the qualified immunity inquiry must focus on "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

As discussed in more detail below, the majority of circuits have recognized that a reasonable officer cannot be expected to know the holdings of every court in the country. They have therefore followed this Court's analysis, looking only to binding precedent from this Court and the controlling jurisdiction or a clear consensus among the circuits.

The First Circuit, however, joined a growing minority of courts in holding that an alleged constitutional right can be "clearly established" by a single case from another circuit. Under this reasoning, the standard is not whether a defendant had "fair warning," *cf. Hope v. Pelzer*, 536 U.S. 730, 741 (2002), but whether any court anywhere has suggested that similar conduct is impermissible.

The minority's approach is inconsistent with the purpose of qualified immunity, which is "to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests." *Maryland v. Garrison*, 480 U.S. 79, 87 (1987). It therefore is also inconsistent with this Court's decisions laying out the "reasonable officer" standard, including *Hope*, *Saucier*, *Wilson v. Layne*, 526 U.S. 603 (1999).

Amici States have a strong interest in ensuring that those cases, which are the foundation of the qualified immunity defense that protects public employees at all levels of government from potential liability, are not undermined. It is critical to note that the interested parties to this case are not only law enforcement personnel. Claims brought under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), affect all local, state, and federal government employees, from road maintenance crews to medical personnel to food service workers. Each of these employees is subject to liability under § 1983 or *Bivens* and is entitled to the protections of qualified immunity.

Amici States fear the First Circuit's decision, if allowed to stand, will negatively affect public employees throughout the country by making them indecisive, or even reluctant to act at all, in uncertain situations. Public employees who must make decisions quickly, particularly law enforcement officers in an arrest situation, should be able to rely on their training and on case law from this Court and their own jurisdiction. Officers in the heat of a violent arrest cannot be expected to know that a case from a different jurisdiction across the county found that what he or she was doing violated a constitutional right. These are the very situations in which qualified immunity is needed.

REASONS FOR GRANTING THE PETITION

In the decision below, the First Circuit held that a single case from another circuit "clearly established" the law in the First Circuit such that Officer Jones had "notice" that his conduct was unconstitutional. (App. 32). Alternatively, the court held that "Jones' conduct was such an obvious violation of the Fourth Amendment's general prohibition on unreasonable force that a reasonable officer would not have required prior case law on point to be on notice that his conduct was unlawful." (App. 33).

Both of the First Circuit's holdings regarding "clearly established law" conflict with this Court's qualified immunity jurisprudence as well as qualified immunity decisions from other circuits. Both holdings are likely to create confusion and uncertainty. Therefore, Amici States urge this Court to grant Jones' petition and reverse the First Circuit's decision. Amici States further urge this Court to resolve a deepening circuit split regarding when case law from other circuits or state courts can clearly establish the law for qualified immunity purposes.

I. The decision below conflicts with decisions of this Court and the majority of circuits as to whether a single case from another circuit can "clearly establish" the law for purposes of qualified immunity.

A. The decision conflicts with this Court's reasonable officer standard.

While this Court has never explicitly held when courts can look to other courts in searching for factually analogous cases, the decision in *Wilson v. Layne*, 526 U.S. 603 (1999), provides powerful guidance. In *Wilson*, this Court rejected a plaintiff's argument that a case from the Sixth Circuit could clearly establish the law in the Fourth Circuit. *Id.* at 616-17. In doing so, this Court reiterated that a right is "clearly established" only when the plaintiff is able to cite to either "cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they [sought] to rely" or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed his actions were lawful." *Id.* at 617.

The First Circuit did not follow either of these directives in the present case. Instead, the First Circuit held that a lone case from the Eleventh Circuit–distinguishable on its facts–clearly established the law for an officer acting in the First Circuit.

Qualified immunity was created to protect government officials from the onus of trial and other burdens of litigation. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Because of this mandate, the

doctrine of qualified immunity is broadly interpreted to shield from liability "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Before *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity contained both an objective and a subjective component. *Id.* at 815. However, because of the subjective component, qualified immunity was often ineffective in resolving insubstantial suits against government officials before trial. *Id.* at 815-16. In an attempt to balance the need to preserve an avenue for vindication of constitutional rights with the desire to shield public officials from undue interference in the performance of their duties as a result of baseless claims, this Court adopted an objective test to determine whether qualified immunity applies. Thus, when government officials are performing discretionary functions, they will not be held liable for their conduct unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

When determining whether the right was "clearly established," the "relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. In other words, although there need not be an indistinguishable case on point, "in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The First Circuit's decision should be reviewed because it conflicts with the principles behind these cases, which are the very foundation on which qualified immunity rests. At the very least, this case presents the Court with the opportunity to definitively settle whether a single case can establish the consensus among circuits that *Wilson* requires. *See Wilson*, 526 U.S. at 617.

B. The First Circuit's opinion places it in the minority of circuits.

Not only is the First Circuit's holding contrary to this Court's decision in *Wilson*, but it represents a dramatic shift in First Circuit jurisprudence. Indeed, the First Circuit had previously held that "a single decision from another court of appeals applying its own precedents is plainly insufficient to meet the requirement that in the light of pre-existing law the unlawfulness must be apparent to a reasonable government official." *Lynch v. City of Boston*, 180 F.3d 1, 14 (1st Cir. 1999) (quotation omitted).

The First Circuit's new position on this question places it among a growing minority of circuit courts that will rely on out-of-circuit law to determine whether a right is "clearly established." Along with the First Circuit, the Seventh, Eighth, and Ninth Circuits regard sister circuits' opinions as controlling precedent for purposes of qualified immunity.

The Seventh Circuit has held that courts can examine "all relevant sources of guidance to the law" when deciding whether a right has been clearly

established. *Burgess v. Lowery*, 201 F.3d 942, 944-46 (7th Cir. 2000); *see also McDonald v. Haskins*, 966 F.2d 292, 294 (7th Cir. 1992) (holding that plaintiff may rely on Third Circuit precedent to demonstrate that law was clearly established).

The Eighth Circuit also takes a "broad view" of what constitutes clearly established law. *See Buckley v. Rogerson*, 133 F.3d 1125, 1129-31 (8th Cir. 1998) (relying on district court decisions from three other circuits); *Konop v. Northwestern Sch. Dist.*, 26 F.Supp.2d 1189, 1194-96 (D. S.D. 1998) (law was clearly established despite no similar case from Supreme Court, Eighth Circuit, any district court within the Eighth Circuit, or the South Dakota Supreme Court).

Similarly, the Ninth Circuit " 'look[s] to whatever decisional law is available to ascertain whether the law is clearly established' for qualified immunity purposes, 'including decisions of state courts, other circuits, and district courts.' " *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004). Even "unpublished decisions of district courts" can clearly establish the law in the Ninth Circuit. *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002). This approach, where a single case from an out-of-circuit court could constitute "clearly established" law would, if followed to its logical end, require public employees to become cognizant of the decisions of at least 158 courts[3] across the country, including the

[3] Including this Court, twelve federal circuit courts of appeals, ninety-four federal district courts, and supreme courts of fifty states and the District of Columbia.

federal courts of appeals, federal district courts, and state supreme courts.

C. The majority of circuits adhere to this Court's precedent.

The remaining circuits look only to controlling authority, or a clear consensus of persuasive authority if one exists, when determining whether the law is clearly established for purposes of qualified immunity. For example, the Second Circuit has held that when there is no Supreme Court or Second Circuit case law on point, "the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit." *Pabon v. Wright,* 459 F.3d 241, 255 (2d Cir. 2006). The Third Circuit has explained that "a lone district court case from another jurisdiction cannot sufficiently" establish a constitutional right "to enable reasonable officials to anticipate [that] their conduct [might] give rise to liability for damages." *Brown v. Grabowski,* 922 F.2d 1097, 1118 (3d Cir. 1990) (internal quotation marks and citations omitted).

The Fourth Circuit has reasoned that reliance on the opinions of sister circuits "merely underscores the lack of Fourth Circuit and Supreme Court law establishing the right for which [plaintiff] contends." *Snyder v. Ringgold,* 133 F.3d 917 (Table), 1998 WL 13528 *3 (4th Cir. 1998) (unpublished). Likewise, the Fifth Circuit has held that its sister circuits' case law is "insufficient" when determining whether a right is clearly established in that circuit. *Breen v.*

Texas A&M Univ., 485 F.3d 325, 339-40 (5th Cir. 2007).

The Sixth Circuit has recognized that for other courts of appeals' decisions to apply, the opinions "must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct . . . would be found wanting." *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988).

"[F]or the law to be clearly established [in the Tenth Circuit], there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City & County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). The Tenth Circuit held that the law may not be "clearly established" even when two sister circuits and two district courts had held it was. *See Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1118 (10th Cir. 2004) (en banc), *rev'd on other grounds*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005); *Guffey v. Wyatt*, 18 F.3d 869, 872 (10th Cir. 1994) (refusing to consider state law decisions in determination of whether law was clearly established); *Hilliard v. City and County of Denver*, 930 F.2d 1516 (10th Cir. 1991) (holding that two cases from sister circuits did not clearly establish a right).

The Eleventh Circuit will only consider precedent binding on the relevant public official; that is,

decisions of the U.S. Supreme Court, Eleventh Circuit, or highest court of the state where the case arose. *See Evans v. Stephens*, 407 F.3d 1272, 1282 n.14 (11th Cir. 2005). Out-of-circuit holdings are "immaterial" as to whether the law is clearly established in the circuit. *Vinyard v. Wilson*, 311 F.3d 1340, 1348 n.11 (11th Cir. 2002). "We do not expect public officials to sort out the law of every jurisdiction in the country." *Marsh v. Butler County*, 268 F.3d 1014, 1033 n.10 (11th Cir. 2001); *see also Hamilton v. Cannon*, 80 F.3d 1525, 1532 n.7 (11th Cir. 1996) (even though a Seventh Circuit decision strongly supported Plaintiff's argument that the law was clearly established, "Seventh Circuit decisions cannot clearly establish the law for purposes of qualified immunity in this circuit."). "Even if out-of-circuit decisions could clearly establish the law in this Circuit, a distinguishable, non-binding case does not clearly establish anything." *Hansen v. Soldenwagner,* 19 F.3d 573, 578 n.6 (11th Cir. 1994).

In contrast to the Eleventh Circuit's warning in *Hansen*, the First Circuit chose to rely solely on a distinguishable, non-binding case, *Smith v. Maddox*, 127 F.3d 1416 (11th Cir. 1997), in holding that Jones violated clearly established law. In *Smith*, a police officer was denied qualified immunity after he broke the arm of a suspect who, though he had previously run from the officer, had since "docilely submitted to arrest." *Id.* at 1418. Unlike the arrest in *Smith*, Jennings violently resisted arrest for several seconds. He kicked Jones. At the time Jones allegedly increased his use of force, Jennings' hand was hidden under his body, thus preventing officers from cuffing him. Quite simply, the readily

distinguishable, non-binding decision in *Smith* could not have provided Jones with "fair warning" that his conduct was unconstitutional.

The minority position, which now includes the First Circuit, risks rendering the doctrine of qualified immunity superfluous, since it would be impossible, from a purely practical standpoint, for the average public servant to become well-versed in the law of so many courts from across the country. Public employees cannot fairly be required to be legal scholars. But if public employees are to be held liable for knowing "whatever decisional law is available," *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004), that responsibility should be established by this Court, not the lower courts of appeal.

II. The alleged constitutional violation was not "so obvious" as to be clearly established in the absence of relevant on point precedent.

A. Officer Jones's conduct was, at worst, within the hazy area between excessive and acceptable force.

Qualified immunity is intended to shield from liability "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In only "rare cases" will a violation "be so egregious that the Constitution . . . on its face may be sufficient to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the total absence of case law." *Williams v. Consolidated City of Jacksonville*, 341 F.3d 1261,

1270 (11th Cir. 2003) (quotation omitted). Contrary to the First Circuit's decision, this is not one of those rare cases.

Where "the [constitutional] violation was so obvious that our own . . . cases gave [officers] fair warning that their conduct violated the Constitution," the court can "conclude that the [officers'] conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Hope*, 536 U.S. at 741-42 (quoting *Harlow*, 457 U.S. at 818). For example, while "[t]here has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery[,] it does not follow that if such a case arose, the officials would be immune from damages . . . liability." *United States v. Lanier*, 520 U.S. 259, 271 (1997) (quotation omitted).

Where "a general constitutional rule already identified in the decisional law . . . appl[ies] with obvious clarity to the specific conduct in question" such that a reasonable officer would be on notice that his or her conduct was unlawful, a prior case on point is not necessary. *Lanier*, 520 U.S. at 271. *See also Brokaw v. Mercer County*, 235 F.3d 1000, 1023 (7th Cir. 2000) ("some governmental actions are so clearly beyond the pale that a reasonable person should have known of their unconstitutionality even without a closely analogous case").

The First Circuit's decision extends this principle beyond its established bounds and rationale.

In *Brosseau*, this Court held that a police officer who shot a fleeing suspect was entitled to qualified immunity due to lack of clearly established law. 543 U.S. at 200-01. This Court noted that general statements of law are particularly deficient, where, as here, the constitutional "area is one in which the result depends very much on the facts of each case." *Id.* at 201. Similarly, in *Saucier v. Katz*, this Court reversed the Ninth Circuit which had found that a right was clearly established based on the too-general proposition that "use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Saucier*, 533 U.S. at 202. As this Court explained, "that is not enough." *Id.* Instead, "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.* at 202.

"Officers facing split-second decisions in dangerous or life-threatening situations are seldom provided with fair warning, notice or guidance by a general requirement of 'reasonableness.' " *Willingham v. Loughnan*, 321 F.3d 1299, 1303 (11th Cir. 2003). *See also Vinyard*, 311 F.3d at 1351 n.21 ("many broad principles of law in the Fourth Amendment context remain insufficient to give fair notice or warning").

"In the context of Fourth Amendment excessive force claims . . . generally no bright line exists for identifying when force is excessive; we have therefore concluded that unless a controlling and materially similar case declares the official's conduct unconstitutional, a defendant is usually entitled to

qualified immunity." *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000). "[P]reexisting, factually similar cases are . . . usually . . . needed to demonstrate that officials were fairly warned that their application of force violated the victim's constitutional rights." *Willingham*, 321 F.3d at 1303.

Without such precedents, the officer's conduct must be "so severe that a reasonable person would have understood that he was violating [the plaintiff's] constitutional rights." *Brokaw*, 235 F.3d at 1022. For example, in *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992), an officer was denied qualified immunity because "it should have been obvious" to any reasonable officer, even though "no precisely analogous case exists," that holding a gun to the head of a nine-year child and threatening to pull trigger was objectively unreasonable, especially where the child was not under arrest, was not a suspect, was not armed, was not attempting to evade officers, and was not posing any threat to the officer or the general community.

Similarly, in *Priester*, the Eleventh Circuit denied qualified immunity, despite a lack of particularized preexisting case law, to an officer who ordered his police dog to attack and repeatedly bite a burglary suspect after the suspect immediately submitted to police, complied with orders to get on the ground, did not attempt to flee or resist arrest, and did not pose a threat to officers. "No reasonable police officer could believe that this force was permissible given these straightforward circumstances." *Priester*, 208 F.3d at 927; *see also Lee v. Ferraro*, 284 F.3d 1188,

1199-1200 (11th Cir. 2002) (despite lack of prior case on point, officer was not entitled to qualified immunity because it was "obvious" that "slam[ming plaintiff's] head against the trunk [of a car] after she was arrested, handcuffed, and completely secured, and after any danger to the arresting officer as well as any risk of flight had passed" was "objectively unreasonable and clearly unlawful").

The qualified immunity inquiry must focus on "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier*, 533 U.S. at 202, and "the information [he] possessed." *Anderson,* 483 U.S. at 641. This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201.

In this case, it is undisputed that, seconds before his injury, Jennings had been actively resisting arrest by kicking at Officer Jones. It is also undisputed that Jennings' injury occurred before he was cuffed and while he was struggling on the ground with one hand held under his body. In such a situation, it cannot be said that every objectively reasonable officer in Jones' situation would have known that it was unconstitutional to increase the use of force against a suspect who had been kicking officers only seconds before and who, despite multiple orders to do so, had not produced both hands for handcuffing. Jones was using a control technique he learned at the police academy.

The fact-intensive nature of the First Circuit's analysis—the majority attempted to count the

seconds between when Jennings may have stopped kicking the officers and when his injury occurred—shows that, like *Brosseau*, "[t]he present case is far from the obvious one where . . . *Garner* alone offer[s] a basis for decision." *Brosseau*, 543 U.S. at 199. Consequently, the need for materially similar precedent is especially strong here. Contrary to the First Circuit's holding, a distinguishable Eleventh Circuit case cannot "squarely govern[]" this case. *Id.* at 201. At most, Jones's conduct, like the officer's in *Brosseau*, "fell in the 'hazy border between excessive and acceptable force.'" *Id.* (quoting *Saucier*, 533 U.S. at 206).

While "officials can still be on notice that their conduct violates established law even in novel factual circumstances," *Hope*, 536 U.S. at 741, the Court should clarify that *Hope* was not an invitation for courts to substitute their views for those of an "objectively reasonable officer" in the defendant's circumstances. Whether under the "general rule" requiring a prior case on point or the "narrow exception" where a constitutional violation is obvious, "pre-existing law must dictate, that is, truly compel (not just suggest or allow to raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances for qualified immunity to be unavailable to a defendant." *Priester*, 208 F.3d at 927.

In this case, at least eight officers, including an expert designated by both Jones and Jennings, testified at trial about Jennings' arrest. *Every* officer who was asked about Jones' conduct testified that

Jones acted reasonably. Where *every* officer testified that Jones' conduct was reasonable, Jones should be entitled to qualified immunity.

B. If multiple judges cannot agree on the state of the law, the law is not clearly established.

Thus far, four federal judges have researched and opined on whether Officer Jones' conduct violated clearly established law such that he is not entitled to qualified immunity.[4] Two judges would have granted Jones qualified immunity because he did not violate clearly established law. (App. 55-63; App. 89-91). Two other judges held that the law was clearly established and denied qualified immunity. (App. 32-36). "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618.

A right is only clearly established when it no longer lies in that "hazy" area of constitutional issues that might be "reasonably misapprehend[ed] by a law enforcement officer at the scene." *Brosseau*, 543 U.S. at 198. Here, multiple judges could not agree on whether the law was "clearly established" – even with the luxury of hindsight, extensive research, and quiet deliberation. As such, the issue appears to remain in that "hazy" area of constitutional law which officers might "reasonably misapprehend" in the midst of a chaotic arrest.

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[4] Judge Torres of the United States District Court for the District of Rhode Island, and Judges Lipez, Torruella, and Lynch of the First Circuit Court of Appeals.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN W. SUTHERS
Attorney General of Colorado
DANIEL D. DOMENICO*
Solicitor General
ELIZABETH MCCANN
Deputy Attorney General
JESS A. DANCE
Assistant Attorney General
CHRISTINE K. WILKINSON
Assistant Attorney General

1525 Sherman Street
7th Floor
Denver, Colorado 80203
(303)866-5634

*Counsel of Record

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ADDITIONAL COUNSEL

TALIS J. COLBERG
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811

MARTHA COAKLEY
Attorney General of
Massachusetts
One Ashburton Place, 20th
Floor
Boston, MA 02108-1598

DUSTIN McDANIEL
Attorney General of
Arkansas
323 Center Street
Suite 200
Little Rock, AR 72201

MICHAEL A. COX
Attorney General of
Michigan
P.O. Box 30212
Lansing MI 48909

BILL McCOLLUM
Attorney General of Florida
The Capitol, PL-01
Tallahassee, FL 32399

JIM HOOD
Attorney General of
Mississippi
Department of Justice
P.O. Box 220
Jackson, MS 39205-0220

MARK J. BENNETT
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813

CATHERINE CORTEZ
MASTO
Attorney General of Nevada
100 North Carson Street
Carson City, NV 89701

LAWRENCE G. WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720-0010

KELLY A. AYOTTE
Attorney General of
New Hampshire
33 Capitol Street
Concord, NH 03301

WAYNE STENEHJEM
Attorney General of North
Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505-0040

THOMAS W. CORBETT, JR.
Attorney General of
Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

LAWRENCE E. LONG
Attorney General of South
Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

ROBERT F. McDONNELL
Attorney General of Virginia
900 East Main Street
Richmond, VA 23219

J.B. VAN HOLLEN
Attorney General of Wisconsin
114 East Capitol
Madison, WI 53703

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No. 07-654

In The

Supreme Court of the United States

KENNETH JONES,

Petitioner,

v.

ADAM JENNINGS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, THE RHODE ISLAND LEAGUE OF CITIES AND TOWNS, IN SUPPORT OF PETITIONER

MARC DESISTO, ESQ. (#2757)
Counsel of Record
DESISTO LAW
211 Angell Street
P.O. Box 2563
Providence, RI 02906-2563
Phone: (401) 272-4442
Fax: (401) 272-9937
marc@desistolaw.com

MIA MANZOTTI, ESQ. (#7087)
One State Street, Ste. 502
Providence, RI 02908-2563
Phone: (401) 272-3434
Fax: (401) 421-0824
mia@rileague.org

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MOTION OF THE RHODE ISLAND LEAGUE OF CITIES AND TOWNS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

Pursuant to Rule 37 of the rules of this Court, the Rhode Island League of Cities and Towns (hereinafter "League") respectfully requests leave to file the accompanying brief as an Amicus Curiae in support of the Petition of Writ for Certiorari in the above referenced case.[1] The League is an Association representing thirty-seven of the thirty-nine cities and towns in Rhode Island. It advocates on behalf of local municipalities for executive and administrative agencies and before the State legislature.

There is good cause for this Court to grant this motion. As set forth in the Introduction and Interest of Amicus Curiae in the attached Brief, the League acts as an advocate for local law enforcement departments. In this matter, the League represents the collective concern of those Departments regarding the issues addressed in the Amicus Curiae Brief.

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[1] Petitioner consented to the filing of the attached brief, but respondent did not.

For these reasons, the Rhode Island League of Cities and Towns respectfully moves for leave to file the attached Brief as Amicus Curiae.

Respectfully submitted,

MARC DESISTO, ESQ. (#2757)
Counsel of Record
DESISTO LAW
211 Angell Street
P.O. Box 2563
Providence, RI 02906-2563
Phone: (401) 272-4442
Fax: (401) 272-9937
marc@desistolaw.com

MIA MANZOTTI, ESQ. (#7087)
One State Street, Ste. 502
Providence, RI 02908
Phone: (401) 272-3434
Fax: (401) 421-0824
mia@rileague.org

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals follow the correct standard in determining that the "clearly established" prong of a qualified immunity analysis is met by obviousness when one similar holding exists in an outside jurisdiction?

2. Upon the conclusion of evidence on a renewed Rule 50 motion, must the Trial Court rely, in every circumstance, on the jury for a determination of contested facts necessary for a qualified immunity analysis?

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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

The Rhode Island League of Cities and Towns, since its inception in 1968, has been widely recognized as the unified voice of local government in Rhode Island.[1] The League currently enjoys a membership that includes thirty-seven (37) of Rhode Island's thirty-nine (39) cities and towns.

Associations like the Rhode Island League of Cities and Towns (hereinafter "League") exist in forty-nine states. They were originally formed for the purpose of representing municipal government interests before state legislatures. This role has expanded to include representing municipalities before executive and administrative agencies; advocating on behalf of local municipal departments, including law enforcement, public works and planning/zoning; appearing before the courts as amicus on various municipal issues; and providing technical assistance, information sharing and training to assist municipal officials in fulfilling their responsibilities.

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[1] The parties were notified ten days prior to the due date of the brief of the intention to file. Respondent has not consented to the filing of this brief, so in accordance with Rule 37(2)(b) a motion prepared as one document with this brief is filed herewith. In accordance with Rule 37.6, amicus state that no counsel for any party has authored this brief in whole or in part. Amicus also states that the Rhode Island Interlocal Trust is responsible for the attorney fees of Marc DeSisto.

The strength and effectiveness of the League is derived from uniting its member municipalities and merging their divergent opinions and needs into a cohesive expression of municipal views, interests and initiatives. It follows naturally, then, that the League members have come together today, and are united, in their position that local law enforcement departments are in desperate need of a clear and unambiguous standard against which to measure proscribed police officer conduct. Municipalities in Rhode Island, and across the nation, have a vital interest in local law enforcement training, and, in that spirit, the League strongly urges the Court to grant certiorari in this case.

STATEMENT OF THE CASE

During his participation in the execution of a search warrant, Rhode Island State Police Trooper, Kenneth Bell arrested Adam Jennings. (R552). Jennings resisted the arrest and during the course of the brief but violent struggle, his ankle was broken. (R338-339). Jennings brought suit, along with others, alleging in part, excessive force in violation of his Fourth Amendment Constitutional Rights.[2]

[2] The suit emanated from a struggle between the Rhode Island State Police and members of the Narragansett Indian Tribe when officers attempted to serve the search warrant to confiscate cigarettes being sold by the Tribe without compliance

(Continued on following page)

The District Court allowed the jury to decide the excessive force claim after denying the motion for Judgment as a Matter of Law (JMOL) made by Trooper Jones on qualified immunity grounds. The jury returned a verdict for Jennings. (App. 104-105).

On a renewed Rule 50 motion made post-verdict, the Trial Court determined that it was a mistake not to grant the original Motion for Judgment because, upon reflection and notwithstanding the general jury verdict, the plaintiff had failed to provide any evidence of excessive force. (App. 79-80). The Trial Court also found that the actions of Trooper Jones were not a "clearly established" constitutional violation. (App. 85-86).

The First Circuit Court of Appeals reversed the Trial Court's grant of the JMOL motion and reinstated the verdict. A divided Court of Appeals found that the general jury verdict in favor of Jennings compelled a finding that excessive force was proved for the qualified immunity analysis. (App. 21, 43, 101). The majority also determined that the Trooper's conduct was a "clearly established" violation of the Fourth Amendment because one case, *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997), confirmed the obviousness of this fact. (App. 32-34).

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with Rhode Island sales tax laws. Two other individuals filed suit along with Mr. Jennings against eight defendants for a variety of claims.

SUMMARY OF ARGUMENT

Amicus advocates for Certiorari to be granted so this Court can address and clarify two issues relating to the qualified immunity analysis. First, fundamental fairness requires fair warning to law enforcement officers before they loose the protections afforded them under qualified immunity. The decision of the First Circuit Court of Appeals in the instant matter creates an unreasonable standard for determining if proscribed conduct is "clearly established." The Court of Appeals determined that one similar case, in another jurisdiction, demonstrated the obviousness of the proscribed conduct. This determination places an unfair burden on law enforcement to be aware of, and conform to, any single holding on similar facts in any jurisdiction.

Amicus urges this Court to clarify the standard for determining when the "clearly established" prong of the qualified immunity analysis is met. Proscribed conduct, for purposes of qualified immunity, should be found to be "clearly established" when there is a case on point in the home jurisdiction, or a consensus of cases nationwide or when it should be obvious to any reasonable person, without reference to decisional law, that the conduct is wrong.

The second issue upon which Certiorari should be granted concerns the manner in which a Trial Court should determine facts necessary for a qualified immunity analysis. Amicus urges this Court to hold that in proper circumstances, the Trial Court is free

to make findings of disputed facts necessary for a qualified immunity analysis without reliance on the jury. In a number of cases, including this one, the First Circuit Court of Appeals has sought guidance from this Court on whether reliance must be placed on a jury's general verdict when making post trial decisions on qualified immunity. In the instant case, the Court of Appeals relied on the general verdict in finding that excessive force was established at trial. Conversely, the Trial Court, found, notwithstanding the general verdict, that the plaintiff did not prove excessive force. Amicus urges this Court to grant Certiorari to settle this conflict.

I. THE FIRST CIRCUIT COURT OF APPEALS MISAPPLIED THE STANDARD ON THE "CLEARLY ESTABLISHED" PRONG OF THE QUALIFIED IMMUNITY ANALYSIS WHEN IT DETERMINED THAT THE CONDUCT OF THE OFFICER WAS "CLEARLY ESTABLISHED" BECAUSE THERE WAS A SIMILAR HOLDING IN ONE CASE IN AN OUTSIDE JURISDICTION

There is a great need for a consistent standard to be applied on the "clearly established" prong of the qualified immunity analysis. Municipalities in Rhode Island and across the nation have at least a two-fold interest in sufficiently training local law enforcement departments. First, appropriate training promotes the safety and welfare of citizens and officers alike. Second, municipalities are subject to civil damages

for the conduct of poorly trained officers who violate individuals' constitutional rights. *City of St. Louis v. Propratnick*, 45 U.S. 112 (1988). Consequently, it is important to municipalities that this Court re-establish its well defined criteria for analyzing the "clearly established" standard so that a consistent approach to training can be implemented.

Simply put, Amicus urges this Court to grant certiorari in this case to answer the question of when proscribed conduct is "clearly established" such that it gives fair warning to law enforcement officers and their municipal employers who train them. In the context of this case, this Court should determine whether an ordinarily prudent officer, and his or her municipal employer, are charged with the obligation of scouring the judicial annals on a national level, and to such a degree, that in any circumstance the officer will know what is acceptable professional behavior.

The First Circuit's decision in the instant case mandates this heavy burden. Amicus asks this Court to review this case to re-establish a more reasonable approach.

In past decisions, this Court has had little difficulty in outlining specific criteria for a consistent application. In *Wilson v. Layne*, 526 U.S. 603, 617 (1999), this Court determined that the law on third party entry into homes (accompanying police officers executing a valid warrant) was not clearly established when that conduct occurred in April of 1992.

The decision was based on the lack of definitive case law in two separate categories. First, the petitioners could not cite to "any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rules on which they seek to rely." *Id.* at 617. Second, the Court noted a lack of "a consensus of cases of persuasive authority such that a reasonable officer could not have believed his actions were lawful." *Id.*

Consequently, the *Wilson* decision guided law enforcement agencies that a case in their own jurisdiction or, alternatively, a number of consistent opinions outside of the jurisdiction, would serve as fair warning. Later, this clear and reasonable approach was expanded in two important respects. This Court formally acknowledged an "obvious" category, such that an officer was expected to know without any case law that certain conduct violated the Constitution. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Next, this Court defined the meaning of "clearly established" in a "more particularized and hence more relevant" sense, laying to rest any argument that general principles of constitutional law served as fair warning. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). Instead, the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 198 (2001).

Until the instant First Circuit decision, it was reasonable for law enforcement to proceed under the premise that challenged conduct reviewed in a

particularized way would cross the "clearly established" line only if it:

1. Obviously violated the Constitution; or

2. A case or cases existed in the jurisdiction demonstrating its constitutional infirmity; or

3. Although there was no case in the jurisdiction, a consensus of cases, nationally, existed such to serve as fair warning.

Amicus strongly urges this Court to confirm this consistent analysis and override the First Circuit's departure from this approach. Officer Jones's conduct was not "clearly established" to be wrong when analyzed within the consistent analysis and framework discussed above. Yet, the First Circuit determined otherwise. Finding no similar case in its jurisdiction, and, a lack of a consensus of cases, elsewhere, the majority opinion relied on one case in the Eleventh Circuit, *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997), to demonstrate the obvious constitutional violation of the trooper's conduct:

> "Although *Smith* helps to demonstrate that the law protecting Jennings from Jones's increased use of force was "clearly established" our conclusion does not depend on this strikingly similar case. Instead, *Smith* emphasizes the obvious unconstitutionality of increasing the force used on an arrestee to such a degree that a broken ankle results, after the arrestee has ceased resisting for several seconds and stated that the force

> already used is hurting his previously injured ankle." (App. 32-33).

In effect, the majority opinion seems to have created an overriding standard that establishes proscribed conduct if even one case exists in an outside jurisdiction. This determination, if it is allowed to stand, sets aside any analysis as to whether there is a case on point in the officer's home jurisdiction or a consensus of cases, nationally. Instead, the First Circuit favors a presumption of "obviousness" so long as one case is on point in a remote jurisdiction.

The Court of Appeals holding is demonstrably flawed when viewed in context with the evidence at trial. The only expert to testify on the issue of proper police methods was a training officer for the State Police Academy, adopted as the plaintiff's own expert who, as the Trial Court summarized, testified "that Jones acted properly in continuing to apply the ankle turn control technique until Jones [sic] was fully under control and in custody and that Jones's use of force was reasonable under the circumstances." (App. 85). The First Circuit's reliance on a similar case in another jurisdiction to determine obviousness seems to be at the deliberate exclusion of this expert's testimony. It is the seemingly heavy reliance placed on this one case that is most troublesome. The dissent highlights the problem:

> "Indeed, the majority goes so far as to reason that it should have been perfectly obvious to Jones that his use of force was excessive, despite the fact that the only expert testimony

> was directly to the contrary and the District Court which heard the evidence concluded otherwise." (App. 56).

The First Circuit's misplaced reliance on one "outside jurisdiction" case demonstrates the need for this Court to re-establish the standard for this prong of the qualified immunity analysis. In addition, the finding of obviousness based on one case in another jurisdiction will have an effect on the final determination of whether the officer reasonably should have known that the conduct was violative of the Constitution. It is far easier to meet this element once there is a finding that the conduct at issue "obviously" was wrong.

As a final note, Amicius submits that it is important for this Court to clear up any ambiguity in this prong of the qualified immunity analysis. It is this prong, whether conduct is clearly established as constitutionally infirm, that may be the initial and decisive determination or, at least the most prominent determination, if the "order of battle" sequence is overruled. *Saucier*, 533 U.S. at 201 (Breyer, J., concurring). Amicus urges this Court to adopt the reasoning of Justice Breyer in support of abandoning the necessity of first finding a constitutional violation in the qualified immunity analysis before proceeding to the second prong of whether that violation is "clearly established." *Morse v. Frederick*, 550 U.S.

___, 127 S. Ct. 2618, 2641 (2007) (Breyer, J., concurring in part, dissenting in part).[3]

A shift in the analysis, when there exists difficult constitutional issues, will make the "clearly established" element more prominent. All citizens will benefit if this Court grants this petition, and re-establishes a consistent framework upon which to decide this, ever increasing, important determination.

II. THE TRIAL COURT SHOULD HAVE DISCRETION IN APPROPRIATE CIRCUMSTANCES, TO DETERMINE CONTESTED FACTS NECESSARY FOR A QUALIFIED IMMUNITY ANALYSIS NOTWITHSTANDING A GENERAL JURY VERDICT

Amicus urges this Court to grant the petition and decide that under proper circumstances, the Trial Court, without reliance on the jury, has the discretion to make findings of fact necessary to determine the issue of qualified immunity. In the instant case, the Trial Court, in addressing the qualified immunity issue, post-verdict, made findings of fact independent of the jury verdict. Specifically, the Trial Judge utilized a general standard that on a Motion for Judgment raising the qualified immunity defense, and

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[3] Amicus notes that the Court granted certiorari on the qualified immunity issue, but, it was not addressed in the majority opinion. The Appellate Court's holding was reversed on a different ground.

decided after trial, "deference should be accorded to the jury's discernable resolution of disputed factual issues." (App. 74).

However, the Trial Court determined that the plaintiff failed to present any evidence on whether the Trooper's action deviated from the standard of conduct expected of an objectively reasonable officer under the circumstances. (App. 85). Consequently, the Trial Court found that the plaintiff did not prove the Fourth Amendment constitutional violation of excessive force. (App. 86).

Conversely, the First Circuit found that the plaintiff did present evidence that could be construed as excessive force. (App. 17). The Appeal's Court noted "that a reasonable jury could have found that Jones increased the force he used after Jennings had already ceased resisting [is] based on the principle that we must view the evidence in the light most favorable to the jury verdict." (App. 13). The First Circuit noted the conflict in its factual analysis, with the lower Court's reasoning, which resulted in the opposite findings of fact, on the critical element of whether excessive force was established by the evidence. (App. 13).

Both the majority opinion and the dissent referenced the need for clarity from this Court as to whether a Trial Judge may act as a fact finder when there is a factual dispute underlying a qualified immunity analysis.

The majority opinion stated,

> "The dissent intimates that the jury's fact finding role may be different in a case involving qualified immunity, noting our prior statement that 'the Supreme Court has not clearly indicated whether the Judge may act as fact-finder when there is a factual dispute underlying the qualified immunity defense or whether this function must be fulfilled by a jury.'" (App. 15).

Similarly, the dissent stated,

> "The Supreme Court has not yet addressed the question of what role jury findings play in the judicial immunity determination, nor has this Circuit. *See, e.g., Kelley v. LaForce*, 288 F.3d 1, 7 n.2 (1st Cir. 2002) ("[T]he Supreme Court has not clearly indicated whether the Judge may act as fact finder when there is a factual dispute underlying the qualified immunity defense or whether this function must be fulfilled by a jury"); *Ringuete v. City of Fall River*, 146 F.3d 1, 6 (1st Cir. 1998) ("Something of a 'black hole' exists in the law as to how to resolve factual disputes pertaining to qualified immunity when they cannot be resolved on summary judgment prior to trial"). No clear answer has emerged from the Circuits."

(App. 46).

The First Circuit Court of Appeals opinion should be reversed because, in determining the facts, it rejected the Trial Court's determination of the lack of

any evidence of excessive force and instead relied on the jury's general determination of liability. Amicus submits that a more reasonable approach is to allow the Trial Court to have the discretion to make factual determinations in appropriate cases, such as, when the Court determines there is an absence of any credible evidence on a necessary element of a constitutional violation.

By necessity, factual findings, in limited areas, exist in jury trials. Courts routinely engage in fact finding assessments in both criminal and civil matters. For instance, Trial Courts are frequently called upon to decide facts in addressing motions to suppress evidence or inculpatory statements in criminal matters. Similarly, Trial Courts must make factual determinations in civil matters relating to a number of affirmative defenses, such as, statute of limitations or laches (i.e., whether a plaintiff knew, or should have known, when a particular cause of action began to accrue).

Submitting disputed facts to the jury in the above stated circumstances are clearly impracticable. In the usual accepted practice, the Trial Court presides over a hearing and makes factual and legal determinations which impact whether, and under what circumstances, a trial proceeds to a jury verdict. A preliminary finding, either pre- or post-verdict, that the elements of qualified immunity have, or have not, been met should be treated in the same manner.

In the instant case, the Trial Judge who heard all of the evidence determined that the plaintiff failed to prove excessive force. The First Circuit allowed the jury's verdict to overshadow the analysis of the Trial Court in this important respect. The Appeals' Court should have determined the propriety of the lower Court's ruling based on an abuse of discretion standard without regard to its interpretation of the jury's general verdict.

Moreover, it is not without precedent for Appellate courts to make findings of fact from the record when necessary. Recently, this Court made reference to a videotape introduced in evidence to determine that there was no genuine issue of material fact in a summary judgment motion involving qualified immunity, despite the Appellate Court's decision to the contrary. *Scott v. Harris*, 550 U.S. ___, 167 L.Ed. 2d 686 (2007). In *Scott,* the Eleventh Circuit Court of Appeals adopted the plaintiff's version of the facts in affirming the denial of summary judgment on qualified immunity grounds. *Id.* at 691. The Eleventh Circuit followed the general rule that upon a motion for summary judgment, when there are differing versions, the Court is required to view the facts in the light most favorable to the non-moving party. However, on appeal to this Court, the plaintiff's version of the facts was rejected because it was at odds with a videotape depicting the incident, which was directly contrary to the plaintiff's version, and not otherwise determined to be inaccurate. This Court stated:

> "When opposing parties tell different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a Court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. That was the case here with regard to the factual issue of whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; and should have viewed the facts in the light depicted by the videotape." *Scott,* 127 S. Ct. at 1779.

In making this assessment, this Court employed a similar analysis as the Trial Court in the instant case, when it found that the credible evidence did not demonstrate the finding of a constitutional violation. In spite of the jury's verdict, in the instant matter, the Trial Judge concluded that there was no evidence on the record to substantiate a claim of excessive force. Coincidently, the Trial Judge also relied, in part, on his interpretation of what was depicted on a videotape introduced as an exhibit.

Amicus submits that in this ever increasing technological age, recorded events placed before the Judge and jury will be the norm in trial proceedings.

Under these circumstances, Trial Courts should be free to decide facts despite a general jury verdict on issues of qualified immunity.[4] If the touchstone set forth by this Court in *Scott* and referenced above is to remain, this Court must address the First Circuit's ruling which takes such "visible fiction" and cements it into a reality. A proper rule would allow the Trial Court the discretion, on a case by case basis, to decide factual disputes in a qualified immunity analysis, subject to appellate scrutiny for an abuse of that discretion. Amicus respectfully asks this Court to grant certiorari to clarify this issue.

III. CONCLUSION

Granting certiorari in this matter will allow this Court to address and clarify the standards to be applied in a qualified immunity analysis. A decision in this regard will allow for a more consistent

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[4] There is additional precedent for Trial Courts to make findings of fact on contentious issues. Amicus notes that in *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985), this Court accepted a District Court's determination after a hearing (without regard to a jury decision) on a key fact issue on a qualified immunity determination. "The District Court held a hearing on the purpose of the wire tap and took Mitchell at his word that the wire tap was a national security interception, not a prosecutorial function for which absolute immunity was recognized." *Id.*

application to qualified immunity. Amicus respectfully requests this Court to grant certiorari.

Respectfully submitted,

MARC DESISTO, ESQ. (#2757)
DESISTO LAW
211 Angell Street
P.O. Box 2563
Providence, RI 02906-2563
Phone: (401) 272-4442
Fax: (401) 272-9937
marc@desistolaw.com

MIA MANZOTTI, ESQ. (#7087)
One State Street, Ste. 502
Providence, RI 02908
Phone: (401) 272-3434
Fax: (401) 421-0824
mia@rileague.org

Counsel of Amicus Curiae

Date: December, 2007